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Labour
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Decisions August 76

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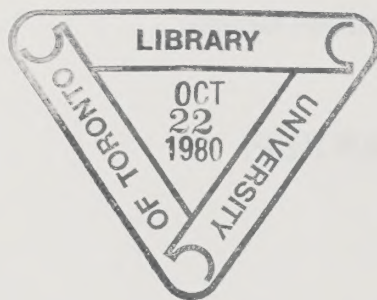
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A Monthly Series of Decisions from the
Ontario Labour Relations Board

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Selected decisions of particular reference value are
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Collective Agreement – Whether employer bound to pay negotiated wage rates before receiving approval of Anti-Inflation Board – Effect of Anti-Inflation Act upon collective agreements prior to Board or Administrator's ruling.

BEFORE: Ian C.A. Springate, Vice-Chairman and Board Members O. Hodges and J.E.C. Robinson, Q.C.

APPEARANCES: *Jorma Halonen and Lorne Richmond for the applicant; R.D. Perkins and R.M. Hoge for the respondents.*

DECISION OF THE BOARD: August 27, 1976

1. Each of these proceedings is the referral of a grievance to the Board for final and binding determination pursuant to section 112a of *The Labour Relations Act*.

2. Section 112a empowers the Board to hear and determine grievances arising out of collective agreements negotiated in the construction industry in much the same manner as would a board of arbitration. Indeed, it is clear that once a grievance has been referred to the Board pursuant to this section the Board fulfills those functions which otherwise would have been the responsibility of a board of arbitration constituted under the terms of the collective agreement itself.

3. The parties were in agreement as to the facts giving rise to these referrals. The applicant is the bargaining agent for certain employees of each of the respondents engaged in tunnelling and relating work in the Thunder Bay area. The applicant and each of the respondents were parties to separate but identical collective agreements, which ran from May 1, 1974 until April 31, 1976. On May 11, 1976 the parties entered into three new identical collective agreements. These new agreements provide for certain wage increases over the wage rates set out in the previous collective agreements. The average increase in employee compensation resulting from these increases is approximately 21 per cent. Each of the respondents are engaged in the construction industry and each employs more than 20 persons. Thus it appears that pursuant to the *Anti-Inflation* (Statutes of Canada 1974-75-76, c. 75, as amended, s. 3[2]), the compensation of the employees of the respondents are covered by the Anti-Inflation Guidelines established pursuant to the regulations under the *Anti-Inflation Act*.

4. From the time of the signing of the new collective agreements the employees have not been paid the full amount of the wages provided for in those agreements. Instead the re-

spondents have been paying wages at a level which results in their employees receiving an approximately 12 per cent increase in their compensation over what they had been receiving under the previous collective agreements. Counsel for the respondents indicated that the 12 per cent figure represented the maximum the respondents felt they could pay without knowingly breaching the Anti-Inflation Regulations, and that to pay more might subject them to penalties under the *Anti-Inflation Act*. Counsel further stated that the respondents had forwarded to the Anti-Inflation Board ("A.I.B.") copies of the new collective agreements as well as the forms required to be filed by employers to report any wage increases and increased benefit costs arising out of newly negotiated collective agreements. The applicant trade union, in turn, has requested "special consideration" from the A.I.B. with respect to these collective agreements based on its claim that the employees involved have an "historical relationship" with certain other employees within the meaning of section 44 of the Regulations to the *Anti-Inflation Act*.

5. As of the date of the hearing the A.I.B. had not issued a decision with respect to the compensation increases arising from the newly negotiated collective agreements. Further, there has been no indication from any of the parties that the A.I.B. has now come down with the ruling.

6. The grievances filed by the applicant all allege a breach of the collective agreements and request payment of the difference between the amounts actually paid to the employees and the amounts stipulated for in the collective agreements.

7. Mr. Richmond, for the applicant, took the initial position that the Board's jurisdiction in this matter was limited to the interpretation and enforcement of the collective agreements before it, and was not concerned with the enforcement of the *Anti-Inflation Act*. The Board accepts that in carrying out its jurisdiction under section 112a its responsibility is to concern itself with the interpretation, application or alleged violation of collective agreements. However, the *Anti-Inflation Act* being a law of general application which may affect the rights of the parties before it, the Board as a legal matter cannot simply ignore its existence. In this regard the parties are referred to the decision of the Supreme Court of Canada in *United Steelworkers of America, Local 2894, et al v. Galt Metal Industries Limited, et al*, 74 CLLC Para. 14,220. It is also relevant to note that it is a settled principle of Canadian constitutional law that whenever Federal and Provincial enactments which are otherwise valid conflict so as to be incompatible, then the Federal enactment must govern. (See: *A.G. Ontario v. A.G. Canada* (Local Prohibition case) [1894] A.C. 189; and in general *Laskin's Canadian Constitution Law*, revised, 4th ed., [1975] pp. 23-59.) The effect of this principle is that whenever the terms of the *Anti-Inflation Act* come into conflict with the collective agreements before us (which are made binding on the parties pursuant to section 42 of *The Labour Relations Act*, a Provincial enactment) then it is the collective agreements which must give way.

8. Counsel for the respondents took the position that there had been no breach of any of the collective agreements. In his view the *Anti-Inflation Act* had the effect of forbidding payment above the guidelines either expressly or by necessary implication since to do otherwise could result in a penalty being levied by the Administrator appointed under the Act. This prohibition, he contended, had the result of making that part of the wage increases which exceeded the guidelines null and void. In support of this contention counsel referred the Board to a number of cases dealing with the law of contract as standing for the

proposition that when a contract purports to fly in the face of a statute then that contract is in fact void and unenforceable. Counsel was careful to contend, however, that the entire collective agreements were not invalid, but merely that part of the compensation increases which exceeded the guidelines (although he conceded that the "arithmetic guideline figure of 12% might later be altered by the A.I.B.)

9. With all due respect, even assuming that the full amount of the negotiated wage increases are above the amount which might be allowed by the A.I.B. or, if the matter is referred to him, the amount which might be allowed by the Administrator, we cannot accept the position of the respondent that part of the collective agreements are null and void. Neither do we regard the entire collective agreements as being void. Although the *Anti-Inflation Act* does appear to create a situation where an employer may be prohibited from paying, and an employee prohibited from receiving, part of the compensation provided for in a collective agreement (see sub-sections 20[4] and 20[5]), nowhere does it state that either all or part of the collective agreement ceases to exist. Rather, the implication seems to be that the prohibitions under the Act operate notwithstanding the terms of an existing agreement. Section 20(8), which deals with the effect of an order of the Administrator, is particularly relevant in this regard. This section states that:

"An order of the Administrator made pursuant to subsection (1), paragraph (2)(a), (4)(a) or (5)(a) is binding on the persons against whom it is made notwithstanding any agreement that was entered into after October 13, 1975 (whether before or after the order was made), notwithstanding any other Act or law enacted or made before or after the coming into force of this Act, and notwithstanding that the order conflicts with anything that was established in accordance with or approved pursuant to any such other Act or law."

The effect of this section appears to be that once the Administrator makes an order forbidding payment and/or receipt of payment above a certain amount, then this order is binding notwithstanding that it may conflict with the terms of a collective agreement. (Such a situation would appear to be analogous to the unenforceable "right" of an employer under a collective agreement to schedule overtime work in contravention of *The Employment Standards Act*; see the *Galt Metals* case referred to above.) In that section 20(8) presupposes that when the Administrator makes an order an agreement exists with which his order may conflict, it is logical to conclude that the existence of the same fact situation prior to an order of the Administrator would not automatically invalidate all or part of the agreement. In this regard we would also note the statement of the Supreme Court of Canada in *Meyers v. Freeholders Oil Co. Ltd.*, (1960) 25 DLR (2d) 81 at p.92 that the effect of a breach of a statutory provision upon a contract must depend upon the terms and intent of the statute, and that it need not in every event cause the contract to be invalid.

10. Having concluded that the *Anti-Inflation Act* does not have the effect of voiding all or part of the collective agreements, the Board finds that the respondents are in breach of their collective agreements with the applicant due to their non-payment of the full amounts stipulated for in the collective agreements. The effect of this determination is that now consideration must be given as to what remedy may be appropriate in the circumstances.

11. Prior to a ruling by the A.I.B. or, if the matter is referred to him, prior to an order of the Administrator, it may be virtually impossible during the first year of the anti-inflation

program to determine the amount of compensation which a particular employer will be permitted to pay and his employees permitted to receive under the *Anti-Inflation Act*. The Regulations to the Act set out an "arithmetic guideline" for the first year of the anti-inflation program comprised of a fixed 8 per cent "basic protection factor", a fixed 2 per cent "national productivity factor" and a variable "experience adjustment factor" which has a maximum of plus or minus 2 per cent depending upon the relationship between past wage increases and increases in the cost of living. (However, if the above calculation would allow for an average annual compensation increase in excess of \$2,400, then the \$2,400 figure becomes the appropriate amount – see section 43(1) of the Regulations.) On top of the arithmetically determined figure may be added certain additional amounts pursuant to section 44(1) of the Regulations, which section reads as follows:

"Where a group

(a) in respect of which

- (i) a compensation plan entered into or established on or before January 1, 1974 expired prior to October 14, 1975, and
- (ii) a new compensation plan was not entered into or established prior to October 14, 1975, or

(b) has an historical relationship with another group,

the employer may in a guideline year increase the total amount of the compensation of all the employees in the group, by an amount that is not greater than the sum of

- (c) The amount permitted under subsection 43(1) (i.e., the "arithmetic guideline"), and
- (d) such further amount as is consistent with the objectives of the Act."

Although paragraph (a) of this section is not applicable in this case, as noted above the applicant has taken the position that an historical relationship exists which would allow the employees of the respondents to receive sums in addition to the arithmetic guideline figure. Even if the applicant is correct in this regard, however, the amount of any additional sums which might be allowed would remain unknown until a ruling of the A.I.B. or, if necessary, until an order is made by the Administrator.

12. Mr. Richmond for the applicant took the not unreasonable position that at least until the amount of the negotiated compensation increase, if any, which the employers were prohibited from paying was determined, the employers were entitled, and indeed required, to pay the full amounts stipulated for in the collective agreements. Even if we assume for the present that this position is correct, payment by the employers of the full negotiated amounts might still create certain future difficulties for both the employers and employees. In particular, should employees be paid the full negotiated compensation increases, the respondents may later be directed by the A.I.B. to effect a recovery of an amount equal to what is determined to be in excess of the guidelines. Indeed, the A.I.B. in its decision of

June 11, 1976 concerning certain employees of the Province of New Brunswick stated that henceforth it would be requiring full recovery of overpayments to employees. (See: CCH Canadian Temporary Economic Controls, para. 82-057). Failure to abide by such an A.I.B. ruling may lead to the matter being referred to the Administrator who, in turn, has the clear authority to order an employer to withhold an amount equal to the excess from future employee wages and pay it to the Federal Treasury (section 20[4]), or to order the employees to directly pay a like amount to the Treasury (section 20[5]). From the point of view of the employees, any one of these possibilities could create personal financial difficulties in that the sums involved may have long since been spent. An employer, in turn, faces the possibility under section 20(4) of having to pay an amount equal to the excess to the Federal Treasury.

13. Although Mr. Richmond's contention that the employers were not prohibited from paying the full negotiated wage rates prior to a determination by the A.I.B. was not an unreasonable one, in fact both the A.I.B. and the Administrator appear to have taken the contrary position. Both have indicated that an employer, prior to an A.I.B. ruling, should not pay employees any more than the applicable arithmetic guideline, and that for an employer to do so might put him in breach of the Guidelines. In this regard see the A.I.B. decision of March 31, 1976 concerning *Atlantic Sugar Company* and the press release referred to therein (CCH Canadian Temporary Economic Controls, para. 82-041) as well as the speech of the Administrator given on April 27, 1976 (CCH Canadian Temporary Economic Controls, para. 55-850). In his speech the Administrator made the following comment (at p. 12,-954):

"Those cases which find their way to the Administrator's Office may encounter yet another stretch of rough water. If parties insist on implementing an agreement at a rate which proves to be in excess of that allowed, they run the risk of not only a payback or recovery but also the possibility of a penalty. This unhappy ending can be avoided easily if parties to an agreement withhold implementation of the agreement – or at least that portion of the agreement which is above the arithmetic amount of the guidelines – until the allowable figure has been finally determined. The Anti-Inflation Board has given advice to this effect in general terms and is, I understand, prepared to give specific guidance in particular cases."

It should be noted that this interpretation of the *Anti-Inflation Act* is also not an unreasonable one, and it should be remembered that the A.I.B. and the Administrator are the ones primarily responsible for the implementation and enforcement of the Act. The effect of this excerpt from the Administrator's speech is that in addition to the possible payments referred to above, if an employer pays in excess of the final guideline figure, even though at the time of payment he is not yet aware of what that figure may be, pursuant to section 20(7) of the Act he may be made subject to a penalty levied by the Administrator equivalent to 25 per cent of the excess compensation paid.

14. This Board has now determined that the respondents have breached their collective agreements with the applicant. However, having regard to the matters set out above it is possible that the parties would prefer to work out their own remedies rather than have them fashioned by this Board. Without in any way seeking to restrict the discretion of the parties, they might, for example, decide that the amounts provided for in the collective agreements which exceed the arithmetic guidelines should be paid into a separate bank account, or per-

haps even into some sort of joint trust account, until such time as a final determination of the amount permitted to be paid is made by the A.I.B. or if the matter is subsequently referred to him, the amount allowed by the Administrator.

15. If the parties are unable to reach an agreement as to how they desire to proceed having regard to this decision, then any party may refer the matter back to the Board for a determination.

16. The Board will remain seized of each of these referrals.

0335-75-R Canadian Independent Automotive Union, (Applicant), v. Chrysler Canada Limited, (Respondent).

Employee – Practice – S1(3)(b) – Whether foremen in a large industrial plant excluded – Effect of participation in disciplinary process – Effect of assessment of probationary employees – Effect of participation in grievance procedure – Effect of discretion to grant leaves of absence.

Practice Note 4 – Whether Board will consider accepting an examination of more than one member, but of less than all members, of each category in dispute.

BEFORE: Donald D. Carter, Chairman, and Board Members P.J. O’Keeffe and J.E.C. Robinson, Q.C.

APPEARANCES: *Raymond Koskie, A.M. Minsky and T. Kuttner for the applicant; C.G. Riggs, J.H. McGivney, Q.C. and W.R. Loebach for the respondent.*

DECISION OF DONALD D. CARTER, CHAIRMAN, AND BOARD MEMBER J.E.C. ROBINSON, Q.C.: August 6, 1976

1. This is an application in respect of a proposed bargaining unit of “all employees of the respondent at its plant in Windsor, Ontario, engaged as general foremen, save and except supervisors and persons above the rank of supervisor, office and sales staff”.

2. The Board, in a majority decision issued on July 3, 1975, held that there were no “preliminary impediments” to a finding that the applicant was a trade union within the meaning of section 1(1)(n) of the *Labour Relations Act*. This determination, however, was made “without prejudice to the respondent’s contention that the foremen and general foremen were not employees within the meaning of the *Labour Relations Act*”. The Board then authorized a Labour Relations Officer to inquire into and report upon the duties and responsibilities of foremen and general foremen. Subsequently, the respondent applied to the Divisional Court for judicial review of the Board’s decision of July 3rd. On September 2, 1975, the Board convened a hearing on the question of whether it should direct the Labour Relations Officer to proceed with the inquiry in view of the respondent’s impending application for judicial review. The Board, in a unanimous decision issued on September 5th, determined that, in the circumstances, it was just and convenient to proceed with the inquiry.

3. The report of the Labour Relations Officer was issued on March 15, 1976. Shortly after the report was issued, the parties agreed to the substitution of another chairman on the panel dealing with this matter. A hearing was then scheduled for May 20 and 21, 1976, to hear representations on the report of the Labour Relations Officer.

4. The five-volume report contained the evidence of twenty-seven persons who would fall within the proposed bargaining unit of foremen and general foremen. This number of persons was only a small portion of the estimated total number of persons, 450, that would fall within the proposed bargaining unit. Both parties requested that the Board accept the evidence of those foremen and general foremen that were examined as being representative of the duties and responsibilities of all the other foremen and general foremen in the proposed bargaining unit. The parties frankly acknowledged, however, that an impediment to this approach was the policy set out in the Board Practice Note No. 4.

5. Paragraph 8 of that note appears to dictate a different approach than that agreed to by the parties:

8. In a case where a Labour Relations Officer is inquiring into the duties and responsibilities of an occupational classification and there is more than one person in an occupational classification, the Labour Relations Officer is to interview all the persons within the classification, unless the parties agree that one person, and only one, is to be interviewed by the Labour Relations Officer and that the evidence taken from him shall be representative of the duties and responsibilities of all of the other persons in the classification or any named persons within the classification. This rule is not to be changed regardless of any agreement made by the parties, except where several persons in a classification have been examined and the parties then agree that one of such persons is representative of all persons in such classification or any named persons within the classification and that the Labour Relations Officer need only report his examination of the one person who is agreed to be representative of the classification. Such agreement must be noted in the Labour Relations Officer's report. It is the responsibility of the parties to have available any other witnesses who they require to give evidence on their behalf.

This statement appears to contemplate a "one-or-all" approach. If the parties cannot agree that one person is representative of all other persons in the same occupational classification, then all persons in that classification must be examined, regardless of any agreement made by the parties. The advantage of such an approach is that it provides a very real incentive for parties who wish the matter to be processed expeditiously to reach an agreement on a single representative for each occupational classification with the resulting benefit for the Board and the parties, of a much less extensive examination. The problem, however, is that this incentive may also produce the opposite result – a prolonged examination. Failing agreement of the parties on a single representative, there is no recourse but to examine all persons within the occupational classification. In many cases, such as this one, the examination of all persons would put a heavy burden upon the resources of both the parties and the Board.

6. The parties argued that the circumstances of this case justified a departure from the approach set out in the Practice Note. The thrust of their argument was that, given the large number of persons in the two occupational classifications and their different work situations, the evidence of one foreman and one general foreman would simply not be representative of the duties and responsibilities of all the other persons in the two classifications. If the approach set out in the Practice Note were adhered to, the only alternative would be an examination of all persons falling within the proposed bargaining unit, approximately 450. An examination of all persons, however, would be unnecessary, in this case, since there was agreement that, in respect of both classifications, either everyone in the classification would be excluded from the Act, or everyone in the classification would fall under the Act. The parties, therefore, argued that, in this case, the Board's policy should not be followed strictly, and that the evidence of the twenty-seven foremen and general foremen should be treated as representative of the duties and responsibilities of the two classifications to which it is related.

7. There is considerable merit to the position put forward by the parties. After reading the Labour Relations Officer's report in its entirety, the difficulties of choosing a single representative for each classification are obvious to us. It is only after reading the testimony of several of these persons that a clear picture of the duties and responsibilities of the two classifications begins to emerge. It was not necessary, however, to read the testimony of all the twenty-seven persons to gain a clear understanding of the duties and responsibilities of the two classifications. We believe that it would have been possible for the parties to reach agreement that the evidence of a certain number of employees, more than one but less than twenty-seven, was representative of the duties and responsibilities of the other persons in the two classifications. The question is whether we should still treat the evidence of the twenty-seven persons as being representative.

8. As a general rule, the Practice Note should be followed by the Board. Although dealing only with matters of procedure, its publication nevertheless creates expectations among the labour relations community. The procedures set out in the Practice Notes are relied upon, and it would be unfair to change the rules to the detriment of one of the parties. In this case, where both parties are asking that they be relieved from the application of Practice Note No. 4, this consideration is no longer relevant. A remaining concern, however, is whether any departure from the policy might dilute the incentive for the parties to agree to reduce the extent of the Board's examination. If the Board treats the evidence of the twenty-seven as being representative in this case, would this result in more lengthy examinations in the future? We think not. This is the kind of case where the policy set out in Practice Note No. 4 is simply unworkable. The difficulties of selecting a single representative are obvious, leaving as the only alternative the examination of approximately 450 persons. It would appear, therefore, that the application of the policy may in some cases prolong the examination, unless some exceptions are allowed.

9. Our conclusion is that the Board should allow departures from the general policy set out in paragraph 8 of Practice Note No. 4, but only where certain conditions have been met. If the parties can establish that the general policy is not appropriate to the circumstance of their case, and that they have used every effort to agree upon the least possible number of persons as being representative of a particular classification, then the Board will treat the evidence of the agreed-upon number of persons as being representative of the duties and responsibilities of all other persons in that classification.

10. In this particular case, as we have stated already, we are of the opinion that it has been established that an application of the general policy would be inappropriate. We have some doubts, however, whether the parties have used every effort to agree upon the least possible number of persons as being representative of the two classifications. Nevertheless, it is our opinion that this second condition should not be too strictly applied in the particular case, since the parties were unaware that the Board might allow a departure from the general policy where certain conditions had been met. Therefore, we will proceed to treat the evidence of the twenty-seven foremen and general foremen as being representative of the duties and responsibilities of all other persons in the two classifications. In future cases, however, we will insist that both conditions be met before allowing a departure from the general policy set out in Practice Note No. 4.

11. The evidence contained in the report of the Labour Relations Officer shows that the duties and responsibilities actually performed by the foremen and general foremen varied from person to person. These variations, which were not great, appeared to be caused by both the different work situations and the different personalities of these people. Despite these variations, we consider that in determining whether the foremen and general foremen, each as a class, exercise either managerial functions or are employed in a confidential capacity relating to labour relations, the evidence should be looked at in its totality. This approach, urged upon us by both parties, recognizes that the issue in this case is the more general issue of where the classifications of foremen and general foremen fit within the respondent's organizational structure. In short, do the foremen and general foremen exercise managerial functions in the context of this particular organization?.

12. The identification of management is fundamental to the scheme of collective bargaining as set out in the *Labour Relations Act*. What is contemplated is an arm's length relationship between the employees represented by a bargaining agent, on the one side, and the employer acting through management on the other side. The Act attempts to create a balance of power between these two sides by insulating one from the other. Employees, therefore, are protected from management interference and domination by the prohibitions against employer interference with trade union and employee rights. Management, by the same token, is protected by excluding from collective bargaining either persons exercising managerial functions, or persons employed in a confidential capacity in matters relating to labour relations. Collective bargaining rights, therefore, are not universal, but must be qualified by the need to preserve a countervailing force on the employer side.

13. The Act, although making clear the need to identify management, does not articulate the specific criteria to be applied in making this identification. Specific criteria, however, have been articulated in the development of this Board's jurisprudence. Two recent Board decisions, *McIntyre Porcupine Mines Ltd.*, [1975] OLRB Rep. Apr. 261 and *Inglis Ltd.*, Board File No. 0787-75-R (as yet unreported) both contain excellent statements on how the Board has gone about identifying managerial employees. The *Inglis Ltd.* decision, recognizing that the exercise of managerial functions may assume different forms, identifies two benchmark situations – one where there is direct influence upon the employment relationship, and one where the influence upon the employment relationship is only indirect. These situations, of course, are only benchmarks and there is the possibility of many variations between them, but they do serve to explain the different approaches taken by the Board. It can be said, therefore, that, the more indirectly the exercise of a person's job responsibilities influences the employment relationship of others, the more the Board looks to

independent decision-making as the criterion for identifying that person as management. Conversely, the more directly the exercise of a person's job responsibilities influences the employment relationship of others, the more the Board looks to effective control or authority over other persons as the criterion.

14. The different forms that the exercise of managerial functions may assume, however, dictates that each situation must be dealt with on an individual basis. There is no general criterion that is suitable for the resolution of all situations. Likewise, there is no onus of general application where the Board is attempting to identify management. (It should be noted at this point that in this case both parties argued that there was a presumption that operated in their favour.) The fact is that this kind of problem is simply not amenable to resolution through general approaches. Each situation must be examined in its own light in order to determine where managerial authority begins.

15. The foremen and general foremen whose status is in question in this case clearly supervise employees, leaving no doubt that there is the potential for these persons to directly influence the employment relationship of those that they supervise. At issue, however, is the degree of influence exercised by these persons. As stated in *McIntyre Porcupine Mines Ltd.*, the appropriate test "requires that a person be *primarily* employed in the direction and supervision of employees and, as well, possess effective control or authority over these employees". In this case we have no trouble in finding that the first arm of this test has been satisfied, since the evidence clearly indicates that the foremen and general foremen perform only supervisory, or related duties. The application of the second arm of the test to the facts in this case poses greater difficulty.

16. The problem in this case is that, although the foremen and general foremen exercise control over the bargaining employees, these supervisors are, in turn, closely supervised by others above them in the organizational hierarchy. Can it be said that these people "possess effective control or authority" over employees? The evidence indicates that the foremen did have the authority to initiate discipline against employees, either through the role they played in the respondent's system of progressive discipline or through the reporting of more serious infractions. Where the reason for discipline was lateness, absences, or quality of work, a system of progressive discipline, providing for an increasingly severe penalty, as similar infractions were reported, was applied. In most cases, the foremen could, on their own, propose discipline up to the third step, the written warning. The fourth step, suspension, was not taken until being discussed with the general foreman, the labour relations officer, and sometimes the superintendent. The foreman would make his recommendation at these meetings, a recommendation that would prevail on some occasions and would be overridden on other occasions. The general foreman would also be an active participant in this type of meeting. The evidence indicated that the foreman appeared to have less authority in respect of more serious infractions, such as participations in illegal strike, being restricted to reporting the incident. Thus, it appears clear that the foreman had a general responsibility for initiating discipline and, in addition, an independent authority to impose minor discipline. There is no doubt in our minds that the disciplinary role of the foreman was an integral component of the respondent's system of discipline.

17. The assessment of the performance of probationary employees was another function performed by the foremen. The foremen would monitor both the work performance and attendance habits of the probationary employees. The evidence indicated that foremen

would recommend that employees not be retained and that this recommendation would be generally followed. It would appear, then, that the foremen did have an authority to effectively recommend the removal of probationary employees.

18. The foremen also played a role in the grievance procedure established by the collective agreement between the respondent and the bargaining agent of the employees that they supervised. Under this procedure, formal grievances were initially submitted to the foremen who, it would appear, had authority to settle grievances involving simple monetary claims. For more important grievances, the foremen appeared to act only as a conduit, preparing an answer for the grievance that would be dealt with further along the grievance procedure. In addition to receiving initially formal grievances, the foremen would also receive a number of complaints made on an informal basis. Again, it would appear that foremen had authority to settle these complaints, if they were of a minor nature.

19. The foremen and general foremen also possessed a certain amount of discretion in granting leaves of absence of a limited duration, in no case exceeding five days. Although it was apparent that the discretion to grant time off was subject to the respondent's manpower requirements, nevertheless the foremen and general foremen did have some discretion to deal with individual applications on their merits. Furthermore, even though a refusal to grant a leave of absence could be appealed to a higher level in the respondent's organization, this constraint would only operate in the case of an unfavourable decision, and would not restrict the foreman's discretion to make a favourable decision.

20. We consider that the four responsibilities discussed above – participation in the disciplinary process, assessment of probationary employees, participation in the grievance procedure, discretion to grant leaves of absence – are the factors most relevant to a determination of whether these foremen exercised effective control or authority over other employees. The foremen did, of course, perform other responsibilities such as a limited role in the assignment of work and the monitoring of absences and return to work, but these factors did not weigh heavily in our consideration of this matter.

21. The position of the general foremen, as distinct from that of the foremen, also requires comment. The evidence reveals less direct contact between the general foremen and the bargaining unit employees, and as a result they appeared to play a less active role in monitoring the bargaining unit employees. On the other hand, the general foremen performed certain functions not performed by the foremen, such as playing an active role in the selection of foremen, evaluating the performance of the foreman, and co-ordinating the work of the department. The general foremen were obviously one level above the foremen in the respondent's organization hierarchy. It is, therefore, clear to us that, if the foremen fall within the managerial structure, the general foremen must necessarily follow suit.

22. After carefully reviewing all of the evidence, it is our conclusion that both the foremen and general foremen exercise managerial functions. The fact is that both groups form an integral part of the respondent's system of management. Despite the fact that the managerial authority exercised by these two groups is subject to close control, it is apparent that the foremen, and general foremen, still exercise effective authority over the bargaining unit employees. The foremen and general foremen represent the first levels of management in the respondent's organization and, therefore, are excluded from the coverage of the *Labour Relations Act*. It follows from this finding that the applicant, despite the lack of pre-

liminary impediments to a finding of status, is not a trade union within the meaning of section 1(1)(n) of the *Labour Relations Act*.

23. The application is dismissed.

DECISION OF BOARD MEMBER P.J. O'KEEFFE:

1. The facts in this matter are as set out in the majority decision.

2. I join with the majority in their determination with respect to allowing a departure from the Board's general policy as set out in the Board's Practice Note No. 4.

3. I dissent from the majority decision dismissing this application for certification for a bargaining unit of "all employees of the respondent at its plant in Windsor, Ontario, engaged as general foremen, save and except supervisors and persons above the rank of supervisor, office and sales staff".

4. The foregoing proposed bargaining unit encompasses some 450 foremen and general foremen. Particular note must be made of the fact that the vast majority of these employees obviously felt the need for protection under the *Labour Relations Act* and obviously at great cost to themselves in time and otherwise went through the onerous procedures of forming themselves into an organization of employees to meet the requirements of the Board with respect to a conditional finding that they qualified as a trade union within the meaning of the relevant section of the *Labour Relations Act*.

5. I agree with the assessment of the evidence in the majority decision with respect to the duties and responsibilities of both the foremen and general foremen. It is not in dispute that the subject employees are supervisory personnel and that they do exercise limited authority over the employees and they supervise and that the foremen and general foremen are themselves subject to close control and supervision by their supervisors. In the pecking order of the organizational chart of the Chrysler Canada Limited conglomerate, the plant foremen are very much removed from the public image of the dynamic, highly rewarded, industry captain mover and shaker of the managerial class. The clear fact emerging from a thorough study of the evidence in this case is that the foreman has long since been relegated from king of the plant to that of a very much controlled lead hand, so low down in the totem pole of the organizational chart that is it any wonder that they are here in this application seeking protection for themselves within a union of their choice.

6. With the greatest respect for contrary opinion I submit that, in the particular circumstances of this case, the majority in their decision gave too narrow a scope to the words "exercises managerial functions" as contained in section 1(3)(b) of the Act. To find that persons exercise managerial functions has the effect of denying those persons representation by the union of their choice and collective bargaining rights provided for in the Act. I find a very clear distinction between exercising supervisory duties and exercising managerial functions as stated in the Act.

7. The Board has moved over the years to reflect the new and evolving industrial relations sophistication that now recognizes the existence of complex personnel departments and personnel officers with highly developed skills and methods of personal management.

In earlier days it was understandable that the foreman was not only considered as management but was in fact the king pin of the plant exercising in most instances extraordinary managerial responsibilities. The new sophisticates in personnel management emanating in most cases from our universities with personnel management related degrees have of necessity trimmed the exercise of real managerial functions not only from the foreman but from much higher-ups in the plant. It is with a realization of this new fact of industrial relations life that the Board has evolved over the years decisions which reflect the stripping of powers from the once great king pin of the plant, the foreman, to others more highly placed.

8. The words “who in the opinion of the Board exercises managerial functions” in section 1(3)(b) of the Act allow this Board to recognize the facts of life in modern industrial labour relations and consequently the Board has in the past, and continues to this present time, viewed those words in the legislation with a liberal and progressive interpretation particularly in the construction industry and in the printing trades where it is a common practice to reflect the peculiarities of those industries by including working foremen in those bargaining units. It escapes me why we would not now reflect the new peculiarities of the evolving plant bargaining units by having a second hard look at the foreman classification in the plants.

9. It is not in dispute that these people exercise certain supervisory functions. The exercise of such functions sets these people apart from those that they supervise, they have as a consequence a different community of interest from the plant employees. The urgent need for collective bargaining on the part of supervisory persons and indeed lower rank designated “managerial” persons is common knowledge through the public disclosures of the plight of such persons as Becker Milk managers and Mac’s Milk managers. In too many instances certain managerial classifications represents nothing more than glorified titles given to employees for exploitation purposes since the sham of managerial responsibility deprives these people of representation by the union of their choice.

10. To find that persons exercising supervisory functions are in our opinion exercising managerial functions is not in keeping with the facts of life today in our highly developed industrial relationships. To deprive supervisory people of collective bargaining is to condemn them to a continued master-servant relationship at a time when the unionized people they supervise have had that old time relationship bondage lifted from their lives.

11. Section 1(3)(b) of the *Labour Relations Act* wherein it uses the words “who in the opinion of the Board exercises managerial functions” is a wide section of the Act and allows for up-to-date opinions formed by an awareness of current modern, liberal and progressive developments in the field of industrial relations. In the result I would find that the foremen who are the subject of this application do not exercise managerial functions within the meaning of section 1(3)(b) of the Act. I would further find that the unit proposed by the applicant is an appropriate bargaining unit for collective bargaining purposes and I would certify the applicant for the unit requested.

1285-76-U Roger Desbois, (Complainant), v. Ernie's Signs Limited, (Respondent).

Discharge For Union Activity – Compensation – Whether grievor has a duty to mitigate damages – Whether trade union has a duty to mitigate damages – Effect of union's delay in filing complaint – Effect of grievor's delay in pressing his case – Effect of grievor failing to continue part time employment without reason.

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members P.J. O'Keeffe and F.W. Murray.

APPEARANCES: *Richard A. Humphrey for the complainant; Tom C. Carroll and Norm Coutu for the respondent.*

DECISION OF THE BOARD: August 5, 1976

1. The Board in a decision dated April 23, 1976 found the lay-off and subsequent termination of Mr. Roger Desbois to be in violation of the Act and directed that he be compensated. The Board held at paragraph 11 of its April 23, 1976 decision:

"The Board finds that the lay-off and subsequent termination of Mr. Desbois to be a violation of section 58(a) of The Labour Relations Act and directs that Mr. Desbois be reinstated into his former employ and that he be compensated for all real losses suffered as a result of his lay-off and subsequent termination up to the time he is offered reinstatement. The Board will remain seized of this matter in the event the parties are unable to agree on the exact amount of compensation."

2. The parties were unable to agree on the amount of compensation and as a result a further hearing was convened on July 22, 1976 for the purpose of hearing evidence with respect to compensation. The sequence of events giving rise to and preceding the filing of this application are agreed and can be summarized as follows. Mr. Desbois received a letter of temporary lay-off on February 18, 1975 which was followed by a letter of termination some twelve weeks later, on June 3, 1975. Mr. Desbois attended at the union office on June 4, 1975 and apprised the union of his situation. He had previously approached the union in February shortly after his initial notice of lay-off and had been informed that the union would negotiate his return. No charges were filed. Mr. Manfred Hoffman, an international representative with the Retail, Wholesale and Department Store Union, the bargaining agent certified in February, 1975 to represent employees of the respondent testified that at the first hearing that there had been confusion between the union representative in the Sudbury office and those in the Toronto office and as a result Mr. Desbois' complaint was not filed with the Ontario Labour Relations Board. Mr. Hoffman called the Toronto office of the union on June 4, 1975 and was told that the charges should have been filed in February and that in view of the Board's Rules of Procedure it was pointless to proceed in June. Mr. Desbois then visited the Ministry of Labour office in Sudbury and spoke with a Mr. J.P. Fortin and, finally, on September 18, 1975 Mr. Desbois approached Mr. Eli Martel, the local MPP. Mr. Martel, who was engaged in election preparations at the time, wrote to the Minister of Labour on October 10, 1975 and received from the Minister a reply, dated November 3, 1975, suggesting that Mr. Desbois launch proceedings before The Ontario Lab-

our Relations Board and enclosing the necessary forms. The application was filed on November 14, 1975.

3. The evidence establishes that during the period of lay-off (February 18, 1975 to June 3, 1975) Mr. Desbois worked for Signcraft Ltd. and earned \$570.96. He was terminated from that job. Shortly thereafter he was taken on as a temporary employee by Modern Neon Signs Ltd. and during an approximate one month period earned \$94.50. Mr. Desbois testified that he was not assigned to a crew by Modern but, rather, was made to work by himself. He surmised that he was assigned in this manner in order to prevent him from influencing the other employees. Mr. Desbois testified that because of the assignments, "I withdrew my services, I left, that's all!" Mr. Desbois subsequently made application for employment at Inco, Tip Top Rubber, Sears, Loeb Food Distributors and Provincial Home Improvement Centre. He was unsuccessful in securing employment at the four last-named employers but he was successful at Inco where he had previously worked for 6½ years and where by his account he had a good work record. He passed the medical at Inco and was offered a job in the labourer classification at the Levack mine. The starting rate would have been \$4.75 per hour. Mr. Desbois, however, told the employment officials at Inco of his need for time off when necessary in order to process his charges against Ernie's Signs Limited and to tend to his duties as the union steward at Ernie's Signs Limited. It was suggested that he not commence work at Inco but return when these matters had been disposed of. Mr. Desbois testified that the last firm which he approached was Tip Top Rubber and that he made this contact in mid-November, 1975. He did not seek employment outside the sign business from this time until his return to Ernie's Signs Limited on April 29th of this year. Mr. Desbois exhausted his unemployment benefits during the period of his termination.

4. In mid-July of 1975, after having left Modern Signs, Mr. Desbois approached Mr. Mike Grozelle, the owner of Creative Sign Studio, and asked for employment. Mr. Grozelle who had just started the business explained that he could not afford to hire anyone. Mr. Grozelle testified that subsequent to this time Mr. Desbois dropped in from time to time, helped him paint and letter his shop and made a number of business calls on behalf of Mr. Grozelle. Mr. Desbois allowed Mr. Grozelle to paint the name of his business on both his trucks and his wife's car. The evidence is clear, however, that at no time did Mr. Desbois accept payment for his endeavours on behalf of Creative Sign Studio. His involvement with Creative Sign Studio continued up to the time of his reinstatement.

5. The purpose of ordering compensation in a case such as this is not to penalize the respondent but, as far as monetary compensation will allow, to put the grievor in the same position he would have been in if the violation of the Act had not occurred. There is, however, a duty which falls to the grievor and that is the duty to mitigate his loss. The common law doctrine of mitigation has been set out in the Canadian case of *Cockburn v. Trusts and Guarantee Co.* (1917), 37 D.L.R. 701 at p. 702:

"The principle upon which the appeal ought to be decided is expounded at length in the judgment of Lord Haldane in *British Westinghouse Electric Co. v. Underground Electric Railways Co.*, [1912]A.C. 673, at pp. 689 and 690. After stating the general principle that when a contract is broken the injured party is entitled generally to receive such a sum by way of damages, as will, so far as possible, put him in the same position as if the contract had been performed – the damages being limited to those that are the natural and direct consequences of the breach – his Lordship proceeded as follows:

"But this first principle is qualified by a second, which imposes on the plaintiff the duty of taking all reasonable steps to mitigate the loss..."

"...this second principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business."

These principles apply in the field of damage awards by both labour arbitration boards and by The Ontario Labour Relations Board. (See Re: *Murray Bros. Lumber Co. Ltd.* [1969] O.L.R.B. Rep. Feb. 1194, *Lyman Tube, Jannock Industries Limited*, [1974] O.L.R.B. Rep. July 456, *Representative and Technical Staff Union and Civil Service Association of Ontario*, 1972 24 LAC 2d (Brown). The Board must now apply these principles to the facts of the instant case.

6. Counsel for the respondent argued that the trade union which initially acted as Mr. Desbois' agent in this matter was negligent in failing to file charges on behalf of Mr. Desbois and that the company should not be hindered with the results of this negligence. This Board accepts that the principle of mitigation extends to the reasonableness of the union's efforts to redress the alleged wrongdoing. See Re: *United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry and Fraser-Brace Engineering Co. Ltd.*, (1968) 19 LAC 212 (Christie) where that Board stated:

"In our view, in this context, the doctrine of mitigation imposes obligations upon the union as well as upon the grievor. Although it is the grievor who has suffered the loss and who will receive the damage payment, it is the union that is party to the grievance and thus in a position analogous to the plaintiff at common law. This means, of course, that the grievor's right to damages can be adversely affected by the union's default, but to hold otherwise means that the company suffers through the union's default. There are similar interests involved where arbitrators have held that an unjustified delay by the union in bringing matters to arbitration may disentitle the grievor to reimbursement for lost wages. (See Re *Oil, Chemical & Atomic Workers, Local 9-672* and *Dow Chemical of Canada Ltd.* (1966), 18 L.A.C. 50 (Arthurs, chairman); Re *Int'l Longshoremen's Ass'n, Local 1654, and Shipping Federation of Canada Inc.* (1967), 18 L.A.C. 174 (Weatherill, chairman). In such cases, no less than here, the employee suffers because of the union's failure to proceed properly."

(See also: *Decor Wood Specialties Limited* case [1974] O.L.R.B. Rep. March 136.)

7. In the matter before us Mr. Desbois was laid off on February 18, 1975 and immediately thereupon made the union aware of his situation and of his desire for redress. The union indicated that it would make his return to work a matter for negotiation. Mr. Hoffman, of the union, admitted that there had been a mix-up between the Sudbury and the Toronto offices of the union and that no further action was taken. Mr. Desbois' return to work was not negotiated and indeed he received a notice of termination on June 3, 1975 whereupon he immediately notified the local union officials and was advised of the aforementioned mix-up and of the resultant timeliness problem which in the union's opinion undermined an application for relief under the Act. The union withdrew from the matter at

this point and, although Mr. Desbois visited the Ministry of Labour office the next day (June 4), it was not until September 19th that he contacted Mr. Eli Martel who commenced the inquiries which led to the filing of the application, on November 14th, 1975. The Board is satisfied, notwithstanding the shoddy representation offered Mr. Desbois by the union, that the union's failure to initiate charges in the face of a notice of lay-off, as distinct from termination, and in the expectation of a negotiated settlement, cannot be judged as unreasonable or as prejudicial to the company. It was the company which cast the die when it served Mr. Desbois with notice of his termination on June 3rd thereby confirming the permanence of the separation. It was at this point, however, that the union withdrew and although its decision to do so is open to question, the subsequent delays prior to the filing of the application can not be attributed to it.

8. The evidence establishes that Mr. Desbois did not contact Mr. Eli Martel or anyone else who could further his complaint until September 18, 1975. Although the complaint was not filed until November 14, 1975 the time period from September 18 to the date of filing can be attributed to the normal bureaucratic response to the inquiries of a citizen and not to any negligence on the part of the grievor. The Board is concerned, however, with the period June 4 to September 18, 1975. Mr. Desbois knew as of June 4, 1975 that he was permanently terminated and that the union would not be processing his complaint and although he visited the Ministry of Labour office on June 4, the evidence discloses that he did nothing from June 4 until September 18 to further his complaint. There was no evidence led to justify, or explain, this delay and in the final result the Board finds that the approximately three-and-one-half month delay between the date of the termination (June 3, 1975) and the date contact was first made with Mr. Martel (September 18, 1975) was not justified. The Board is of the opinion that two weeks was sufficient time for the grievor to have contacted Mr. Martel or someone else who could have forwarded his allegations. The two week period is a reasonable one and in light of the fact that the grievor was informing prospective employers that he would require time off in order to attend to these matters. The company should not be prejudiced by the additional 3 months' delay.

9. The evidence establishes that Mr. Desbois attempted to seek employment both within and outside of the sign business. He was successful in attaining employment within the sign business albeit for a short period of time but he had no success with outside employers. Counsel for the respondent argued that Mr. Desbois could have had full time employment with Inco and chose not to accept that employment. The evidence establishes that Mr. Desbois passed his medical and was offered employment but that he stipulated to the Inco officials that he would require time off to tend to union matters, including his termination. Mr. Desbois testified that he had a good record with Inco and wished to be honest with them. A grievor can not be faulted for being honest with prospective employers pending the disposition of outstanding litigation which may require time off work and which may result in a return to a former place of employment. A grievor is not expected to mislead or in any way undermine his or her reputation in the search for alternate employment. This is especially true in a town such as Sudbury where there is a predominant employer and where a good work record with the predominant employer is to be valued. The Board finds no fault with Mr. Desbois' conduct as it relates to the securing of employment with Inco.

10. The Board is, however, concerned with the reasonableness of Mr. Desbois' efforts to mitigate on two other counts. *Firstly*, the evidence establishes that Mr. Desbois voluntarily quit his temporary employment with Modern Signs which had earned him \$94.50 in his

approximate one month tenure with that firm. The Board is not satisfied that he had justification for quitting and finds that the respondent company should not be prejudiced by this action. Desbois worked for Modern Signs during the month of June 1975 and, accordingly, the Board will deduct \$94.50 per month for the period July 1975 to the date of his reinstatement from the compensation which would otherwise be owing. *Secondly*, the Board notes the lack of effort by Mr. Desbois to obtain alternate employment from mid-November 1975 to the time of his reinstatement. The evidence establishes that he made no further efforts outside of the sign business from this time and was content to work unpaid for Mr. Grozelle's Creative Sign Studio. The evidence further establishes, however, that Mr. Desbois was attracted to, and determined to pursue, a career in the sign business. Although he unsuccessfully sought alternate employment outside the sign business prior to November we are not prepared to find that he was required to continue these efforts having made arrangements to work "gratis" for Mr. Grozelle. He had no other choice if he wishes to remain in his chosen trade in the City of Sudbury having been terminated from Ernie's Signs and Signcraft and having quit Modern Signs, an action which will cause the amount of his damages to be appropriately lessened.

11. The purpose of compensation as noted at the outset is to make the grievor "whole"; to return the grievor to the position he would have been in if the transgression had not occurred. The employees of Ernie's Signs received a 25 cent per hour across the board wage increase in mid-March of this year. Mr. Desbois would have been entitled to this increase if he had not been terminated and accordingly the Board's compensation calculations will take this increase into account. The Board rejects the complainant's argument that Mr. Desbois should be compensated and reinstated at the sign erector's rate.

12. The Board has calculated the compensation owing to Mr. Desbois as follows:

DIRECT WAGES LOST AS A RESULT OF UNLAWFUL TERMINATION

2,216 hrs. at \$4.25 per hour	\$ 9,418.00	
240 hrs. at \$4.50 per hour	1,080.00	
TOTAL	\$10,498.00	\$10,498.00
LESS		
1) Earnings during the period	\$ 665.46	
2) 3 months undue delay in filing charges (see para 8) June 18 to Sept. 17, 1975	2,210.00	
3) Projected earnings at Modern Signs (see para 10) Sept. 18, 1975 to Apr. 28, 1976	705.00	
TOTAL	\$3,580.46	\$3,580.00

TOTAL DIRECT WAGES OWING	6,918.54
VACATION PAY OWING (4%)	176.74
TOTAL OWING	\$7,195.28

The Board, therefore, directs the respondent company to pay Mr. R. Desbois the sum of \$7,195.28 in compensation for his unlawful termination and to pay the same amount within two weeks of this decision.

0530-76-U Ontario Secondary School Teachers' Federation, District I, (Applicant), v. **The Education Relations Commission**, (Respondent).

Consent to Prosecute – School Boards and Teachers Collective Negotiations Act S.O. 1975 c. 73 – **Whether Education Relations Commission is subject to prosecution for failure to act on complaint of bad faith bargaining.**

BEFORE: Kevin M. Burkett, Vice-Chairman, and Board Members J.D. Bell and O. Hodges.

APPEARANCES: *Leon Paroian, Robert Dumond, Gerald Dimmick and Leisha Mazarawich for the applicant; D.K. Laidlaw, J.B. Noonan and D.S. Lawless for the respondent.*

DECISION OF THE BOARD: August 17, 1976

1. At the outset of the proceedings the applicant sought leave to withdraw its request for consent to prosecute against the following named respondents: Messrs. O.B. Shime, H.W. Arthurs, L.R. Betcherman, G. Levassuer and J. Ronson. The Board granted leave to withdraw and as a result the only respondent in this application is The Education Relations Commission (hereinafter referred to as the E.R.C.) which is a tribunal created by the legislature and exercising certain responsibilities under the School Boards and Teachers Collective Negotiations Act S.O. 1975 c. 73 (hereinafter referred to as Bill 100).

2. This is an application for consent to institute a prosecution of the E.R.C. for an offence under Bill 100. The applicant alleges that the E.R.C. failed to perform its statutory duty as required by paragraph (f) of subsection (1) of Section 61, namely to determine at the request of the applicant whether or not the Windsor Board of Education was negotiating in good faith and making every reasonable effort to renew an agreement.

3. The parties introduced into evidence a series of letters. The situation giving rise to the exchange of these letters and, indeed to this application, was the deterioration of negotiations for a 1976 agreement between the applicant, District I of the Ontario Secondary School Teachers Federation, (hereinafter referred to as the OSSTF, Dist. I), and the Windsor Board of Education. The failure of the parties to negotiate a settlement resulted in a strike vote being conducted by the OSSTF, Dist. I, a subsequent one day cessation of work

on March 30, 1976, and the withholding of marks pending a resolution of the dispute. The Board proceeded to lock out the teachers (for a period of 39 days) commencing April 1. The lock out, during which the schools were closed, lasted until May 10, 1976. During this period the E.R.C. attempted to assist the parties to reach an agreement, but was unsuccessful. In the end result a settlement was legislated. Bill 75, which was passed on May 10, 1976 ordered an end to the lock out, and referred the matter to arbitration. The exchange of correspondence, which was admitted into evidence, can be summarized, as it is relevant to a determination of this matter, as follows:

- 1) Jan 20, 1976 Letter Mr. Leon Paroian, Q.C.
Counsel – OSSTF, Dist. 1
to
E.R.C.

Petitioning the E.R.C. to exercise its duties to determine whether or not Windsor Board bargaining in bad faith.

- 2) Feb. 17, 1976 Letter David L. Tough,
Consultant – E.R.C.
to
Mr. Leon Paroian, Q.C.

Acknowledges January 20, 1976 letter – enclosed Form 10, Application for a Determination Concerning Negotiation; copy of E.R.C. policy and procedures re good faith bargaining.

- 3) April 30, 1976 Telegram Mr. E.G. Abey, Chairman
Windsor Neg. Team –
OSSTF, Dist. 1
to
Chairman, E.R.C.

“Formally requesting ERC to exercise its duty pursuant to s. 61(1)(f).”

- 4) May 6, 1976 Letter D.S. Lawless,
Acting Chief Exec. Officer,
E.R.C.
to
Mr. E.G. Abey

Indicating April 30 telegram was placed before Commission on May 5 and advising that ERC will fulfill its duty when request made in accord with its policy.

- 5) May 13, 1976 Letter Mr. L. Paroian, Q.C.
to
Mr. O.B. Shime,
Chairman, E.R.C.

Questioning authority of ERC to demand a time limit extraneous to the act. Encloses Form 10.

- 6) May 19, 1976 Letter Mr. D.S. Lawless
to
Mr. L. Paroian, Q.C.

Advising that he has been instructed by ERC to attempt to secure a settlement; asking for advice in writing as to what can be done to settle and indicating preparedness to meet with the parties.

- 7) May 21, 1976 Letter Mr. L. Paroian, Q.C.
to
Mr. D.S. Lawless

Indicating that alternatives set out in letter of May 19 do not meet request. Asking that hearing be held.

- 8) May 27, 1976 Letter Mr. D.S. Lawless
to
Mr. L. Paroian, Q.C.

States "I shall report to the Commission at its next meeting that the matter has not been settled and I shall place the request before the Commission for determination."

- 9) May 28, 1976 Letter Mr. L. Kavanaugh
Representing Windsor Board
to
Mr. O.B. Shime

Requesting E.R.C. not to do anything with respect to determination of bad faith bargaining pending completion of arbitration hearings scheduled for June 7-8, 17-18.

- 10) May 31, 1976 Letter Mr. L. Paroian, Q.C.
to
E.R.C.

Objecting to further delay and requesting hearing to be held.

- 11) June 11, 1976 Letter Mr. D.S. Lawless
to
Mr. L. Paroian, Q.C.

Covering enclosure of "*Interim Determination of the Education Relations Commission under Sect. 61(1)(f).*"

4. Section 61(1)(f) of the School Board and Teachers Collective Negotiation Act 1975 states:

61. (1) It is the duty of the Commission,

- (f) to determine, at the request of either party or in the exercise of its discretion, whether or not either of the parties is or was negotiating in good faith and making every reasonable effort to make or renew an agreement.

5. Although the applicant OSSTF, Dist. 1 did not file its request in the prescribed form until May 13, 1976, counsel takes the position that the E.R.C. should be prosecuted because it has not acted upon the applicant's request for a determination under section 61(1)(f). He argued that the E.R.C. did not have the authority under Bill 100 to require compliance with Form 10 and, in the alternative, that if such a power did exist, it was of a directory and not of a mandatory nature. He argued further that in any event the January 20 request of the OSSTF, Dist. 1 for a determination complied in substance with the Form 10 and was, therefore, sufficient to require the E.R.C. to perform its duty as laid down in Section 61(1)(f) of Bill 100. With reference to the "Interim Determination" of the E.R.C., released under cover of Mr. Lawless's letter of June 11, 1976, counsel for the applicant characterized it as merely a notice of adjournment which did not satisfy the duty of the E.R.C. as set out in Section 61(1)(f) of Bill 100. Although admitting that it was unusual for an agency such as the E.R.C. to be liable for criminal prosecution for failure to carry out its prescribed duties, counsel for the applicant referred the Board to Sections 78(1) and 79 of Bill 100 and argued that these sections clearly intend such a result. Counsel reasoned that the legislature obviously intended that the E.R.C. should not be able to act with impunity and that, accordingly, this Board in the face of a *prima facie* case should exercise its discretion, grant leave to prosecute, and thereby facilitate a determination as to the nature of the duty set out in Section 61(1)(f) of Bill 100. Counsel argued that the interests of labour relations would be served if such a determination were made.

6. The Board in deciding whether to grant leave to prosecute must put its mind to three issues which raise the following questions: *Firstly*, is the E.R.C. an entity which can be prosecuted under the provisions of Bill 100? *secondly*, has the applicant established a *prima facie* case warranting prosecution? and *thirdly*, should the Board in the exercise of its discretion under Section 78(6) of Bill 100 grant leave to prosecute? Counsel for the respondent argued that the Board must answer each of these questions in the negative.

7. The Board considers the following sections of Bill 100 to be relevant to a determination of the first issue referred to in the preceding paragraph:

- 78. (1) Every person who contravenes any provision of this Act is guilty of an offence and on summary conviction is liable to a fine of not more than \$500 for each day upon which the contravention occurs or continues.
- (2) The Council and every member association and every board and the Federation and every affiliate and every branch affiliate that contravenes any provision of this Act is guilty of an offence and on summary conviction is liable to a fine of not more than \$100,00 for each day upon which such contravention occurs or continues.

- (4) Where the Council or a member association or the Federation or an affiliate or a branch affiliate is guilty of an offence under this Act, every officer or representative thereof, and where a board is guilty of an offence under this Act every member of the board, who assents to the commission of the offence shall be deemed to be a party to and guilty of the offence and is liable to a fine under subsection 1 as if he had been convicted of an offence under subsection 1.

79. A prosecution for an offence under this Act may be instituted against any body, association or organization in the name of the body, association or organization whether or not the body, association or organization is a body corporate and, for the purposes of any such prosecution, any unincorporated body, association or organization shall be deemed to be a body corporate.

80. Any act or thing done or omitted by an officer, official or agent of the Federation, an affiliate, a branch affiliate, the Council, a member association or a board or by a member of a board within the apparent scope of his authority to act on behalf of the Federation, affiliate, branch affiliate, Council, member association or board shall be deemed to be an act or thing done or omitted by the Federation, affiliate, branch affiliate, Council, member association or board, as the case may be.

8. The scheme of Bill 100 is clearly directed towards regulating the negotiation of collective agreements between school boards and teachers. To this end the legislature established the Education Relations Commission (S. 61(1)) to oversee and assist in the negotiating process (S.60 (1)(a)(b)(c)(d)(e)); to determine the manner of conducting, and to supervise votes, (S.61 (1)(g)), to advise the Lieutenant Governor-in-Council when the continuance of a strike or lock out will jeopardize the successful completion of the course of study (S61 (1)(h)) and to make quasi-judicial determinations as to whether or not parties are negotiating in good faith (S.61(1)(f) and S.81(2)) and any further functions which are necessary to carry out the intent of the Bill. The act recognizes the adversarial nature of the collective bargaining process and gives to the E.R.C. a jurisdiction over the "combatants" and the power to determine certain issues between them.

9. The applicant seeks leave to prosecute the E.R.C. because of its alleged failure to assume its jurisdiction and make a determination pursuant to Section 61(1)(f) of Bill 100. Counsel for the applicant could not cite a single case in which a quasi-judicial body had been prosecuted for failure to assume jurisdiction, but rather, he relied on the "unique" wording of Section 78(1) and Section 79 of Bill 100. He acknowledged that the normal procedure for redress of a jurisdictional error by a body such as the E.R.C. was by way of judicial review. Indeed this Board has been unable to find any other legislation which renders a judicial, quasi-judicial or administrative tribunal liable to criminal prosecution for failure to properly exercise its jurisdiction. It goes without saying that the result of such a liability, if one exists in this case, is an unusual one for the E.R.C. Whereas it is given authority over the contesting parties on the one hand it can be criminally prosecuted by one of the parties over which it has authority. A successful prosecution would result in a fine being paid to the

Crown, out of funds received from the same source. The Board considers the result to be peculiar to say the least. The Board is aware, however, that if the words of the statute in their natural and ordinary sense are unambiguous, they must be given effect. In the absence of a specific reference to the E.R.C. in Section 79, however, the atypical and unreasonable consequence of the interpretation urged by counsel for the applicant requires the Board to carefully read not only the section at issue but the Bill as a whole. In such circumstances the Board subscribes to the procedure set out in "*The Construction of Statutes*" by E.A. Driedger – Butterworths, 1974, at page 37:

In reading judicial decisions where the meaning of a statute is in issue one must bear in mind that the court always begins with rival constructions put forward by opposing counsel, for otherwise there would be no lawsuit. The judge is at the outset, even before he has construed the statute, likely to weigh the consequences of one construction against those of the other, and if one strikes him as being absurd, unjust or unreasonable according to his values, he will try to arrive at a construction that will avoid those consequences. His proper function at that stage is not that of moulding the statute to fit his feelings. His initial reaction ought only to serve as a warning to read the statute closely and carefully. If, after having done so, he finds that one of the two constructions is not one that the words are reasonably capable of bearing, he must reject it, whatever may be the consequences of the other, for there is then only one meaning. But if he finds that the words are reasonably capable of both constructions, then he must select the one that is best in harmony with the words, intention and object of the statute, and again, without regard to consequences. Only where there are two reasonable constructions and the issue cannot be resolved objectively by reference to the intention and object of the statute as ascertained from a reading of it in its total context is it proper to make a choice on the basis of personal concepts of reasonableness.

(See also *Maxwell on The Interpretation of Statutes*, 12th edition, Sweet & Maxwell Limited (1969) at page 58.)

10. The applicant argued that the E.R.C. is a "body" or organization which is subject to prosecution in the same manner as any other body or organization which contravenes the Act. An isolated reading of Section 79 supports this interpretation and would therefore bring the E.R.C. within the parameters of Section 78(1). The Act, however, is designed to facilitate the negotiation of collective agreements between school boards and teachers and therefore regulates the conduct of a number of unincorporated bodies, associations and organizations. These are referred to in Section 1 of the Bill, (see S. 1 (a)(c)(d)(f)(g)(i)) and further reference is made to them in sections 78(2) and (4) and Section 80 of the Bill which are sections dealing with prosecution for contravention of the Bill. Section 79(2) provides that the Council and every member association and every board and the Federation and every affiliate and every branch affiliate that contravenes the Bill is guilty of an offence and liable to a fine of not more than \$10,000 for each day upon which the offence occurs or continues. Section 78(4) provides that where one of the organizations referred to above is guilty of an offence any officer, representative or board member as the case may be who assents to the commission of the offence is deemed to be a party to, and guilty of, the offence. Section 80 holds the above named organizations vicariously liable for the acts or omissions of their

officers, officials or agents and in the case of a board, a member thereof. Whereas the applicant argues that the E.R.C. is no different than any other unincorporated body, the Bill by referring specifically to a number of unincorporated bodies in setting down the maximum \$10,000 fine, in establishing vicarious liability and in deeming officers, representatives and board members a party to, and guilty of, an offence committed by the named organization, has excluded the E.R.C. from the operation of these sections. These sections which are companion sections to Section 79 and Section 78(1) refer to bodies, associations and organizations whose conduct is regulated by the Bill and over whom the E.R.C. enjoys authority. The Board, in reading the sections referred to by the applicant, in conjunction with the companion sections, rejects the applicant's argument that for purposes of prosecution the E.R.C. is no different than any other unincorporated entity which contravenes the Act. The Board further finds, having regard to the companion sections, that Section 79, the section relied upon by the applicant, is capable of bearing a restrictive as well as a broad interpretation: restrictive in the sense that the bodies, associations or organizations referred to in Section 79 are those whose conduct is regulated by the Bill. Section 79, when read in context, is capable of supporting an interpretation which implicitly restricts the reference to "any body, association or organization" to those whose conduct is regulated by the statute, and therefore excludes the E.R.C. even though it might be considered to be a "body."

11. It is a long standing rule of statutory interpretation that where the result of one of two reasonable interpretations would lead to an absurdity the other ought to be selected. (See Maxwell on *The Interpretation of Statutes* [supra] at page 208). It is understood, however, that a person who interprets a statute cannot depart from the meaning of the statute merely because he thinks that the consequences would be absurd. Rather the absurdity must be an "objective absurdity" as that term has been used by E.A. Driedger in *The Construction of Statutes* [supra]; namely, disharmony with what best accords with the intention, object or scheme of the Act. This Board considers that the interpretation of Section 79 of Bill 100, which renders the E.R.C. liable to criminal prosecution for failure to carry out its duties, results in an "objective absurdity." It is not in accord with the scheme of the Act that the body established to regulate the conduct of the bargaining participants should itself be liable to prosecution by one or other of those regulated for failure to properly exercise its jurisdiction. Accordingly the Board adopts the interpretation of Section 79 which precludes the unusual and unreasonable consequence referred to above. The Board finds that Section 79 provides for prosecution of any body, association or organization whether or not a body corporate, whose conduct is regulated by the Bill. The Board finds that the E.R.C., the regulator as it were, does not fall within the ambit of Section 79 and is not, therefore, "a body" liable for prosecution.

12. If we are wrong in our interpretation of the statute the Board finds in the alternative that the applicant has not made out a prima facie case which would warrant leave to prosecute. The evidence establishes that on June 11, 1976 the E.R.C. released an interim determination under Section 61(1)(f) with respect to the request made of it by the applicant in this matter. Regardless of the alleged failure of the E.R.C. to comply with the *Statutory Powers and Procedures Act* as required by Section 81(2) of Bill 100, or the content of the interim determination which the applicant refers to as nothing more than a notice of adjournment, this Board, in the absence of any time limits in Section 61(1)(f), must conclude that the E.R.C. is exercising its jurisdiction and assuming its duty as set out in that section. This Board is not empowered to make findings with respect to the compliance by the E.R.C. with the rules of natural justice and accordingly we make no further comment with respect to the

manner in which the E.R.C. has conducted itself. Until such time as the courts have overturned the interim determination of the E.R.C. by way of judicial review it must be considered as a valid exercise of its authority.

13. If we are wrong in both our interpretations of the Bill and in our finding on the merits the Board has a discretion under Section 78(6) of Bill 100 as under The Labour Relations Act. The legislature has taken cognizance of the Board's special expertise in the field of labour relations and has given to the Board a discretionary power to grant or to withhold leave to prosecute. In the normal course the Board is called upon to exercise its discretion when one party to the collective bargaining process seeks leave to prosecute another. In these situations the Board, in the exercise of its discretion looks to the practical effect – to the labour relations ramifications (see *Accoustical Association of Ontario* case [1975]OLRB July, 539). As counsel for the applicant so aptly put it, however, this matter is not between the combatants but rather between “one of the combatants and the referee.” Although the Board is faced with a unique situation, the underlying considerations giving rise to the exercise of its discretion remain; namely, the practical labour relations implications.

14. Counsel for the applicant argued that “the referee fell asleep during the fight” and should therefore be prosecuted. The evidence establishes, however, that the referee was not asleep during the fight but, rather, was actively engaged in efforts to resolve the dispute. Indeed Section 61(1) of the Bill which sets out the duties of the E.R.C. requires the E.R.C. to assist the parties to negotiate collective agreements. Section 61(1)(d) provides:

61. (1) It is the duty of the Commission,

(d) to provide such assistance to parties as may facilitate the making or renewing of agreements;

15. There are, therefore, co-existing duties which fall to the E.R.C. in respect of the bargaining process. Not only must it assist the parties but it must also make determinations of good faith bargaining as requested. Although the purpose of both duties is to facilitate the bargaining process the simultaneous carrying out of these duties can result in a counter-productive effect. Whereas successful mediative efforts require the parties to be receptive to persuasion and compromise, a hearing under section 61 (1)(f) focuses the attention of the parties away from the bargaining table, and at the same time forces the parties into an adversarial setting. The concurrent attempt to carry out both duties can, in the circumstances of a particular case, serve to frustrate the primary objective of each. The Bill does not require the E.R.C. to make a determination “forthwith” (see Section 15 which requires the E.R.C. to appoint “forthwith”) with respect to a request under Section 61(1)(f), nor does it lay limits within which the E.R.C. must respond to such a request. It would appear that the legislature, having regard to the purpose of the Bill and the coexisting duties of the E.R.C., gave to the E.R.C. a discretion as to the timing of its response to a request under Section 61(1)(f). This Board considers it to be in the best interests of labour relations in the education sector that such a discretion exists. The practical results far outweigh the advantages of an immediate hearing and determination in every case. The E.R.C should be free to respond to a request under Section 61(1)(f) within the context of the particular bargaining situation. Accordingly, in the circumstances of this case, the Board withholds its consent.

16. The application is dismissed.

0576-76-R Paul Emile Lafrance, (Applicant), v. International Woodworkers of America, (Respondent), v. **Genwood Industries Ltd.**, (Intervener).

Termination – Petition – S49(2)(a) – Whether the Board should dismiss a deficient petition on preliminary objection or proceed to hear evidence – Effect of petition being only a withdrawal from membership – Effect of petition being addressed to, and prepared for, presentation to the employer.

BEFORE: M. G. Picher, Vice-Chairman, and Board Members L. Hemsworth and O. Hodges.

APPEARANCES: *David R. Shelly, Paul Emile Lafrance and Roger Belair for the applicant; J. Sack and H. Ritchie for the respondent; P. H. Forrest for the intervener.*

DECISION OF THE BOARD: August 23, 1976

1. This is an application for terminating bargaining rights filed under section 49(2)(a) of The Labour Relations Act.
2. The applicant filed with the Board a petition bearing twenty-seven signatures all of which were collected and witnessed by him.
3. On behalf of the respondent union Mr. Sack made a preliminary motion that the petition be dismissed at the outset for defects in its wording. He argued that since the petition did not on its face indicate a clear desire on the part of the employees to be no longer represented by the union that the Board was without jurisdiction to proceed any further in its inquiry. The preamble to the petition was written in French and translates as follows:

“June 9, 1976

Gentwand Industries Ltd.

We the members of the American International Lumber Union no longer wish to have \$6.00 deducted monthly, which are our union dues, and we consider ourselves as no longer being members of the union.”

Mr. Sack alleged four deficiencies with respect to wording. Firstly, that there was an error in the name of the employer, which is Genwood Industries Ltd. Secondly, that there was an error in the name of the union whose name in the French original appeared as “L’Union Internationale de Bois de l’Amerique” whereas the French name of the Union in its constitution appears as “Le Syndicat International des Travailleurs de Bois d’Amerique”. Thirdly, that the petition appeared to be addressed to the employer, and fourthly, that the petition on the face of it did not express that the employees no longer wished to be represented by the trade union but rather that they no longer wished to have dues deducted by the employer or to remain members. It is this fourth ground that Mr. Sack emphasized, arguing that the jurisdiction of this Board in an application under section 49 must be predicated on the existence of a petition which on its face clearly indicates a desire to be no longer represented by the union and that absent a statement of desire in such terms this Board is without jurisdiction to proceed. He submitted that unlike under section 7 of the Act where the Board has some discretion to admit petitions in certification proceedings notwithstanding

their strict wording, under section 49 there is no such discretion, and our jurisdiction depends upon the condition precedent of a properly worded petition.

4. At the hearing we ruled against the preliminary motion. There can be no doubt that a petition may be so worded as to raise serious doubt in the mind of the Board that it represents the voluntary wish of employees to be no longer represented by a union and for that reason the application will fail. But that is only to say that its wording, like the stationery upon which it is written and the circumstances of its origination, preparation and circulation, is but one piece of evidence to be weighed by the Board at the end of the day in deciding whether the petition is a voluntary written indication by the employees that they no longer wish to be represented by a union. We are not able to accept the suggestion of Mr. Sack that faced with the wording of the instant petition we are without jurisdiction to enter upon that very inquiry and that the petitioners must be turned away at the hearing room door because their choice of words leaves room for uncertainty. In support of his motion Mr. Sack cited *Bentley's Sporting Goods Ltd.* 59 CLLC 18,129 (1959), a decision of this Board. In *Bentley's* case the Board was called upon to determine whether a union was entitled to represent employees in the renegotiation of a collective agreement, and so to apply for conciliation services for that purpose. The employer alleged, on the basis of documents signed by certain employees, that the union did not have sufficient membership among the employees to any longer represent them. The documents consisted of a set of statements saying that the employee in question no longer wished union dues to be deducted from wages, or that he no longer wished to be a member of the union, that he wished to sever his connection with the union, or a combination of two or more of the foregoing. In rejecting this documentary evidence as being sufficient *in itself* to disestablish the union's right to represent the employees within the terms of section 68(1)(f) of The Labour Relations Act R.S.O. 1950 c. 194, the Board stated:

"Let us assume that this evidence had been presented to the Board ... by a group of employees in support of an application for termination of bargaining rights under section 41 [the present section 49] of the Act. It could scarcely be said that such evidence *standing by itself* would meet the requirements of that section, namely, that "a majority of the employees in the bargaining unit have signified in writing that they no longer wish to be represented by the trade union."

[emphasis added]

5. The Board in that case cannot be taken to be saying that wordings such as those used would be inadmissible in section 49 applications or somehow oust the jurisdiction of the Board, but merely that standing alone, i.e. without further evidence to substantiate their intended meaning, they would not suffice to satisfy the Board that the employees in question did not want to be represented by the union, as opposed to not wanting to be members or be subject to dues check-offs. That decision contemplates, and rightly, that the Board would dismiss a section 49 application that was based solely on documentary evidence such as was then before the Board. But it is implicit in the decision that the Board would proceed to the merits and uphold the application where the documentary evidence did not "stand by itself", but was buttressed by further evidence sufficient to establish the voluntary wishes of the employees that they no longer be represented by the union.

6. In *Cooper-Weeks Ltd.* [1967] OLRB Rep. November 767, also cited by Mr. Sack, this Board was faced with a section 49 (then section 43) petition written in Italian. The translation of the preamble made at the direction of the Board read:

“We, the undersigned employees of Cooper-Weeks Limited, 501 Alliance Avenue, Toronto, no longer wish to belong to Fur and Leather Workers’ Union Local 82 AMC & BW of NA, – CIO.”

The applicant and the employer suggested that the proper translation would be “to be part of” or “to be represented by”, and the respondent union, using the Board’s translation, made essentially the same argument as Mr. Sack does before us. The Board took the view that proceeding on the basis of any of the three suggested translations the documents submitted did express the wishes of the signatories no longer to be represented by the respondent.

7. At the hearing in the instant case in ruling against the preliminary motion we cited our readings of *Bentley’s* case and *Cooper-Weeks* as reasons for our decision. To those reasons we would add the following: It is the duty of this Board to concern itself with the substance and not merely the form of documents tendered in support of an application for the termination of bargaining rights. It may be that in some cases the wording of such documents may be so inadequate as to cause this Board to dismiss the application upon a preliminary motion. This is a question that falls to be determined within the particular circumstances of each case.

8. Section 49(3) of the Act is as follows:

Upon an application under subsection 1 or 2, the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as is determined under clause j of subsection 2 of section 92 that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

It is the intention of section 49 that it shall be the primary concern of the Board to ascertain the wishes of the employees voluntarily expressed in writing. The right of employees to come before us would be seriously abridged, and the ability of the Board to ascertain their wishes would be unnecessarily fettered, if we were to adopt the “forms of action” approach suggested by Mr. Sack. The right of a group of employees to bring their written wishes before the Labour Relations Board cannot be made to depend strictly upon the choice of words made by persons who may be uninitiated in the niceties of pleading. Frequently, as here, petitions of this kind are drafted by rank and file workmen of limited writing ability and without the assistance of legal counsel. To adopt the legalistic approach suggested would be unrealistic and would frustrate the intention of the Act.

9. Nor can we accept the suggestion that section 49 reflects any intention of the Legislature that the jurisdiction of this Board to proceed to the merits under that section de-

depends upon the choice of words of an applicant in documents that are, after all, only evidence in support of his application. There can be little doubt that a decision of this or any tribunal made in the complete absence of evidence where such evidence is a statutory prerequisite to fact-finding is liable to be set aside on judicial review. (Section 2(3). The Judicial Review Procedure Act, S.O. 1970 c. 48). There is nothing in section 49 of the Act nor in section 48 of Regulation 551, R.S.O. 1970 to mandate that a petition must use any particular words or phrase to be admissible as evidence. Section 92(2)(k) of the Act provides:

“(2) Without limiting the generality of subsection, the Board has power,

- (k) to determine the form in which and the time as of which evidence of representation by an employers’ organization or of objection by employers to accreditation of an employers’ organization or of signification by employers that they no longer wish to be represented by an employers’ organization shall be presented to the Board in an application for accreditation or for a declaration terminating bargaining rights of an employer’s organization and to refuse to accept any evidence of representation or objection or signification that is not presented in the form and as of the time so determined.”

Pursuant to that section, section 48(1) of Regulation 551, R.S.O. 1970 provides as follows:

“Evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall not be accepted by the Board on an application for certification or for a declaration terminating bargaining rights unless the evidence is in writing, signed by the employee or each member of a group of employees, as the case may be, and,

- (a) is accompanied by,
 - (i) the return mailing address of the person who files the evidence, objection or signification, and
 - (ii) the name of the employer, and
- (b) is filed not later than the terminal date for the application.”

There are no other formal requirements. At the hearing it is the duty of the Board to determine that the requisite number of employees in the bargaining unit voluntarily expressed that they no longer wish to be represented by the union. Their expression must be in writing and may, within the bounds of reason, be worded in a number of ways that do not necessarily parrot the words of section 49. For all of these reasons the motion must fail.

10. Turning to the merits of the petition before us we find, having regard to the evidence of the applicant, that the application must fail. Mr. Lafrance testified that he drafted the petition and that the document’s first intention was to notify the employer and the union of the wishes that it expressed. Its use as part of an application to terminate bargaining rights came as a secondary purpose, as part of a general move to oust the union, and it is ap-

parent that at the outset the petitioners had only a vague conception of how that would be done. It appears that only after consulting counsel they viewed this petition as evidence in support of a section 49 application.

11. We need not decide whether that of itself could be fatal. What is fatal is that, as Mr. Lafrance candidly testified, each employee who signed the petition was told that it would be immediately presented to the employer. This in fact was done and the employer then made photo-copies of the petition for the applicant upon his request so that the employer and union could each receive copies.

12. The vigilance of this Board to insure that petitions of this kind are untainted by management influence is well established. (See *Pigott Motors (1961) Ltd.* (1962) 63 CLLC ¶16,264 at page 1129). Given the very nature of the relationship between employer and employee the Board has consistently been concerned whether the wishes of employees can be freely expressed where facts are proved that establish the influence, whether direct or indirect, of the employer. The Board recognizes that the free expression of an employee's wishes is seriously questioned when the employee expresses himself with the knowledge, or the reasonable suspicion, that the employer is either participating in the petition drive or is watching its results and may come to know which employees did and did not sign.

13. To use the language of an earlier decision of the Board, the petition will fail if the evidence shows that the circumstances of the petition's origination, preparation and circulation are such that the petition is "...reasonably and likely to be construed by the employees as an open invitation to proclaim their loyalty to their employer by signing the petition." (*Peel Block Co. Ltd.* (1963) 63 CLLC ¶16,277 at page 1157). In the case before the Board the applicant and intervening employer did not take issue with evidence that in the fairly recent past the intervener had consistently refused to reinstate employees who had engaged in an illegal walk-out and that the employer has always taken a "hard line" position against the union. These things the employer may, of course, be entitled to do. We recite them not because they are in any way improper, but because they are relevant background to the state of mind of the employees at the time of the petition. Viewed against that background the petition before us, gathered as it was with the foreknowledge of the employees that it was addressed to the employer, amounts in the words of *Peel Block*, to an invitation from the applicant to the petitioners to openly proclaim their loyalty to the employer. The applicant has therefore failed to establish to the satisfaction of this Board that the document submitted reflects the voluntary wishes of the employees that they no longer desire to be represented by the respondent union.

14. The application is dismissed.

0578-76-M Mrs. Helena Wybenga, (Applicant), v. The Canadian Union of Public Employees and its Local Number 1956, (Respondent Trade Union), v. The University of Ottawa, (Respondent Employer).

Religious Objector – S39(1)(b) – Whether beliefs expressed are truly those of the applicant – Whether beliefs are cause of objection to paying dues.

BEFORE: Pamela C. Picher, Vice-Chairman, and Board Members F.W. Murray and H. Simon.

APPEARANCES: *F. Vandezande for the applicant; Pierre-Yves Boucher for the respondent employer.*

DECISION OF THE BOARD: August 24, 1976

1. This is an application brought under section 39(1)(b) of The Labour Relations Act wherein the applicant requests exemption from the obligation to pay union dues to the respondent trade union because of her religious conviction or belief. Although the applicant would object to joining the union as much as to paying dues, the union security clause in the collective agreement in question, Article 3.02, only requires all members of the bargaining unit to pay union dues; it does not require their membership in the union.

2. This application is timely under the terms of section 39(2)(a). The collective agreement in question is the first one entered into by the professional librarians at the University of Ottawa and C.U.P.E., Local 1956, and the applicant was in the employ of the University of Ottawa at the time this collective agreement was entered into. The applicant, Mrs. Wybenga, has been continually employed at the University of Ottawa since November, 1974; the collective agreement was entered into on May 20, 1976.

3. To qualify for an exemption under section 39, the applicant must satisfy the Board that her objection to paying union dues is based on her religious conviction or belief and not simply a desire to avoid paying money to the union.

4. In making its determination the Board applies a subjective test of sincerity. It is not appropriate for the Board to sit in judgment of the applicant's beliefs and determine whether those beliefs are right or wrong, reasonable or unreasonable, justified or unjustified. The question the Board must ask itself, then, is whether the religious beliefs expressed are truly those of the applicant. (See *Sheraton Limited-Sheraton-Connaught Hotel* [1972] OLRB Rep. Mar. 249 at p. 252; *Corporation of the Borough of North York* [1971] OLRB Rep. July 363 at p. 382; *Joseph Brant Memorial Hospital of the Burlington-Nelson Hospital* [1971] OLRB Rep. Aug. 505 at p. 511; *Funk v. The Manitoba Labour Board* (1976) 76 CLLC ¶14,006 at p. 14,236.)

5. In deciding whether a sincerely held belief is a religious belief the Board takes a very broad view of the parameters of "religious." The beliefs need not coincide with, or even be based on, the tenet or creed of a particular religion. (See *Corporation of the Borough of North York* [1976] OLRB Rep. July 363 at p. 278). In interpreting the meaning of "religious" in relation to a similar religious exemption provision found in the Crown Employees Bargaining Act, 1972, the Ontario Supreme Court in *The Civil Service Association of Ontario (Inc.) v. Anderson* (1976) 9 O.R. (2d) 341 at p. 344 made the following observation:

“It is not necessarily ... related to a belief in the supernatural. One of the definitions of ‘religion’ in Webster’s Dictionary is ‘relating or devoted to the divine or that which is held to be of ultimate importance’.”

In light of the above principles the questions for the Board to ask itself are: (1) whether Mrs. Wybenga’s beliefs are sincerely held, (2) whether they are religious, and (3) whether they are the cause of her objection to paying union dues.

6. Mrs. Wybenga was born in Holland and came to Canada in 1949. She is a member of the Christian Reform Church in Ottawa which she attends twice weekly. She donates an average of \$10.00 a week to her church and, though she has no children, she supports the Christian education program in Ottawa.

7. Mrs. Wybenga has received extensive education and specializes in the computer aspects of library science. Upon completion of her training she was offered a good position at the Public Library in London, Ontario. Because C.U.P.E. held the bargaining rights for the employees of that library, which meant that she would have been required to pay dues to the union, she refused to accept the position. In Ottawa she had job offers from both the federal government and the University of Ottawa. She chose to accept the position with the University of Ottawa because the federal government employees were unionized while the University of Ottawa employees were not.

8. The nature of Mrs. Wybenga’s objection to C.U.P.E., Local 1956, is stated by her to be as follows:

My Christian conviction and belief does not permit me as a matter of conscience to join or in any way to financially support the Canadian Union of Public Employees and its Local 1956 on the following grounds:

- (1) I believe that the whole of man’s life, including his hours of labour, must express his love of God and his neighbour in accordance with the principles of the Bible, which principles are the basis of my daily life;
- (2) The Canadian Union of Public Employees and its Local 1956 does not in its Constitution expressly acknowledge the Bible nor give expression to the principles of the Bible;
- (3) The Canadian Union of Public Employees and its Local 1956 does not carry on its day-to-day activities in accordance with the principles of the Bible, which principles I firmly believe.

Elaborating on these basic objections she said that it is the humanistic aims of C.U.P.E., Local 1956 that are in conflict with her belief that one’s primary responsibility is to God. She said she doesn’t believe in continually trying to seek better wages because it may at times be at the expense of others. Of particular trouble to her is the manner in which she believes C.U.P.E., Local 1956, seeks its ends, i.e., by power and harassment. The possibility of an illegal strike violates her beliefs in that she believes that according to the Bible one must obey the government in everything. Even the possibility of a legal strike offends her because she feels that it is God’s will that people solve their differences through peaceful communication rather than through the use of threats or economic pressure.

9. Mrs. Wybenga testified that if she were forced to pay dues she would have to resign her position because her conscience would not allow her to support a union that violates her religious beliefs.

10. Mrs. Wybenga began her drive for exemption as soon as she learned that C.U.P.E., Local 1956 had been certified for the professional librarians at the University of Ottawa and had had time to read the constitution. The certificate issued on November 3, 1975 and on November 8, 1975 she wrote to the union requesting an exemption from paying union dues. An unfruitful exchange of letters followed between the union and Mrs. Wybenga. An additional exchange of letters ensued between Mrs. Wybenga and the University wherein the University stated that it would keep her religious objection in mind in its negotiations with the union. Any effort made by the employer on her behalf was unsuccessful, as is evidenced by the inclusion of the union security clause in the collective agreement. The religious convictions expressed in the above mentioned letters were the same as those expressed before the Board.

11. The Board found Mrs. Wybenga to be a credible witness and entertains no doubt as to the sincerity of her beliefs or that it is these beliefs which cause her to object to the union. Additionally, in view of the expressed contents of Mrs. Wybenga's beliefs there can be no question that they would properly be termed "religious." Her continual contributions to the Christian Reform Church and to Christian schools in Ottawa, despite the fact that she has no children, underscore the depth of her religious beliefs. The Board readily accepts the religious origin of her distaste for any form of pressure which a union might bring to bear in negotiating an agreement – the strike weapon being the most obvious, though not the only example. That her religious objection to the union is sincerely held is well supported by her refusal of a good job offer in London, Ontario due to the unionization of the library employees together with her choice of the University of Ottawa as an employer rather than the federal government because of the absence of a union at the University, as well as her unceasing and immediate efforts through various exchanges of letters to procure a religious exemption from paying union dues once C.U.P.E. Local 1956 had been certified.

12. Accordingly it is hereby ordered that:

- (1) Article 3.02(b) of the collective agreement between the Canadian Union of Public Employees, Local 1956 and The University of Ottawa entered into on May 20, 1976 does not apply to Mrs. Helena Wybenga;
- (2) Mrs. Helena Wybenga is not required to pay any dues to the Canadian Union of Public Employees, Local 1956

provided that amounts equal to any dues or other assessments are paid by the applicant to a charitable organization mutually agreed upon by the applicant and the respondent trade union. However, if the applicant and the respondent trade union fail to so agree then the parties should inform the Board in writing forthwith, including such representations, if any, that each may care to make as to the charitable organization to be designated and the Board will then designate a charitable organization pursuant to section 39(1) of The Labour Relations Act.

0855-76-U The Citizen, A Division of Southam Press Limited, (Applicant), v. The Ottawa Newspaper Guild, Local 205, of the Newspaper Guild, Local 205, of the Newspaper Guild and James McCarthy, (Respondents).

Strike – S82 – Whether boycott of material emanating from a ‘struck’ operation a strike.

BEFORE: D. H. Kates, Vice-Chairman.

APPEARANCES: *F. G. Hamilton, S. Roberts and R. Mills for the applicant; G. Charney and J. McCarthy for the respondents.*

DECISION OF THE BOARD: August 23, 1976

1. This is an application under section 82 of the Act whereby the applicant requests that a declaration be granted that the respondent trade union called and authorized an unlawful strike and that its agent and officer, Mr. J. McCarthy, counselled, procured, supported and encouraged such a strike contrary to the relevant provisions of the Act.

2. The facts described herein are generally without dispute. Apparently the Canadian Press and the Canadian Wire Service Guild were at all material times engaged in a negotiating dispute which found expression by the affected employees in engaging in work stoppages that included rotating strikes and slow downs. The applicant employer is a member of an association of newspapers that takes advantage of the news services provided by the C.P. Press Wire Service. On or about August 9th to the 11th, 1976 employees engaged by the applicant in its editorial department commenced a boycott of C. P. Press copy thereby inhibiting management of the applicant from publishing news items in the usual routine manner. At all material times the parties were privy to a collective agreement which had expired on July 20th, 1976 and were in the process of conciliation with a view to resolving their particular dispute.

3. The evidence discloses that at all material times the applicant advised the representatives of the respondent and various members of the bargaining unit of the illegality of their actions. The response to the applicant's admonition as confirmed by the membership at a meeting held shortly thereafter was that the employees in good conscience could not handle any copy emanating from a “struck” agency. The evidence further discloses that notwithstanding the employer's concerns, efforts were made by representatives of the respondent to elicit the support of other trade unions representing employees engaged in other facets of the employer's enterprise to support their cause. These efforts appeared to have been abortive.

4. In any event as a result of the boycott the employer was compelled to rearrange its personnel of both management and bargaining unit employees, in order to assure that their clientele were properly serviced with the news service normally provided. The evidence is also uncontradicted that neither the employer nor the trade union endured or sought the complete shutdown of the newspaper. Indeed, the evidence shows that in the evening of Wednesday, August 11 when the boycott was cancelled, the trade union respondent viewed the boycott as “superfluous”. In short, the respondent was satisfied that it had attained its objective of alerting the employer of its view of the CP negotiating dispute and urged that

efforts be made on the employer's part to hasten its resolve. Nevertheless, we are satisfied that during the boycott the news service provided by the applicant was not only inconvenienced but was also disrupted thereby affecting its capacity of providing full news coverage. The evidence also shows that the boycott placed the applicant at a serious disadvantage with respect to the news service provided by its competitor "The Ottawa Journal".

5. The evidence does show however that the trade union's efforts to impose an effective boycott were without success. Apparently the respondent's strategy was somewhat tied to the methods used by The Wire Service Guild in imposing sanctions upon C.P. Press during the course of their dispute. Upon advising that the respondent's boycott was terminated, Mr. McCarthy could give no assurance that the boycott would not be repeated. Indeed he could only advise Mr. Mills, the applicant's executive editor, that the boycott was only temporarily curtailed. On August 10, the instant application for relief was filed with this Board. The evidence also indicates that the C.P. Press dispute is as of the date of the hearing unresolved and neither party could inform us of the likelihood of an imminent settlement. In short, there was no assurance adduced before this Board that a more effective strategy in the C.P. Press dispute would not trigger another boycott.

6. The Board having regard to the foregoing is satisfied that the boycott engaged in by the respondent's members was an unlawful strike in that it was designed to limit the output of employees of the applicant as an effective tool of protest with respect to the undue prolongation of the C.P. Press dispute. However noble and conscientious were the objectives of the respondent we view that the means employed to achieve this end were unlawful having regard to the particular status of the parties' relationship before a conciliation officer. The Board therefore declares that some purpose to collective bargaining will be served in the exercise of our discretion, if a declaration issues advising the respondent's membership to this effect. Moreover, the Board suspects that so long as the C.P. Press dispute remains and in having regard to the objective sought in the applicant's application we ought to order and direct:

- 1) that the respondent trade union through its officers and agents notify its membership of the said declaration through its usual means of communication,
 - 2) that the respondent trade union and its agent James McCarthy, President, cease and desist from threatening to call or authorize an unlawful strike including the threat of a refusal by the respondent's members to edit process or handle any news stories and other material provided by the Canadian Press Wire Service.
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0670-76-U London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Complainant), v. **The Corporation of the County of Middlesex**, (Respondent).

S79 – Arbitration – Whether the Board will hear a complaint where the matter complained of may be taken to arbitration pursuant to a collective agreement.

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members E. Boyer and F. W. Murray.

APPEARANCES: *Ted Wohl, John Askin and George Marshall for the complainant; Andrew Wright for the respondent.*

DECISION OF THE BOARD: August 20, 1976

1. This is a complaint filed under section 79 of The Labour Relations Act alleging that the respondent has acted contrary to the provisions of section 56 and 67(1) of the Act.

2. The facts giving rise to this application are not in dispute. The complainant and respondent were parties to a collective agreement effective during the calendar year 1975 and covering certain employees of the respondent at its home for the aged known as Strathmere Lodge. On February 10, 1976 the parties entered into a new agreement to be effective from January 1, 1976 to December 31, 1976. This new collective agreement provided for a "three step" wage increase with part of the increase becoming effective on the first of each of the months of January, July and October. The agreement also stipulated for improvements in a number of fringe benefits. Upon the signing of the collective agreement, the fringe benefits were put into effect as was the first step of the wage increase. However, on June 28, 1976, the respondent informed the complainant that in view of possible penalties it might incur under the Anti-Inflation Act, the respondent's Personnel Committee had decided not to pay the July first wage increase and also to begin to withhold certain fringe benefits. The respondent indicated to the complainant that such a move would ensure that it stayed within the Anti-Inflation Guidelines, at least until such time as the Anti-Inflation Board might decide that a greater amount could be paid.

3. The remedy requested by the complainant in this matter was that the respondent be ordered to pay the full amount of the wages and benefits provided for in the collective agreement. This is basically the same remedy requested by the union in a grievance filed on July 5, 1976 arising out of the same fact situation. On July 23, 1976 the complainant wrote to the respondent and indicated that it would be referring the grievance to arbitration pursuant to the provisions of the collective agreement. The letter also set out the name of the complainant's nominee to a board of arbitration.

4. Where an alleged unfair labour practice also constitutes at the same time an alleged breach of a collective agreement, the Board has generally chosen to exercise its discretion under section 79 of the Act and defer the matter to grievance arbitration. (See *Collingwood Shipyards* [1967] OLRB Rep. July 376; *Sunnybrook Food Market (Keele) Ltd.* [1972] OLRB Rep. March 210.) However, in exceptional circumstances where the arbitration process is "clearly unavailable or unsuitable to resolving the issue", the Board will

depart from its general practice and will itself hear the matter. Examples of such exceptional circumstances include situations where it is alleged that the union has procured the discharge of an employee (*Bowin v. United Ass'n of Journeymen et al* 67 CLLC Para 16,004), where it is alleged that there has been collusion between the union and the employer to the detriment of an employee (*Pitt Street Hotel Ltd.* 63 CLLC Para. 16,275), where it is obvious that a grievance arbitrator cannot provide effective relief (*Imperial Tobacco Products (Ontario) Limited* [1974] OLRB Rep. July 418), and where it is obvious that the interests of an employee will not be effectively represented at arbitration because of a direct conflict between the interests of the trade union and those of the employee (*Imperial Tobacco Products [Ontario] Limited*, supra.)

6. Counsel for the respondent contended that the facts of this case were such that the Board should not defer to arbitration. In particular he noted his concern that a number of months might pass before the arbitration procedure was completed. The dangers of such a delay, he contended, would be further heightened by the fact, as established in evidence, that the employees have voted to give authority to the complainant trade union to call an illegal strike over this issue.

7. Although the complaint is framed in terms of an alleged breach of The Labour Relations Act, the complainant is in fact seeking relief from an alleged breach of the collective agreement. The issue is one which clearly falls within the jurisdiction of a board of arbitration established pursuant to the terms of the collective agreement itself, and there appears to be no impediment to having such a board of arbitration properly hear and dispose of the matter. This being the case, the Board declines to depart from its established practice of deferring to arbitration. It should be noted in this regard that the length of time it takes to constitute a board of arbitration and to schedule a hearing are, to a large extent, within the control of the parties and their nominees. We would hope that the parties will seek to have this matter go on to arbitration with all due dispatch. In any event, we decline to depart from the Board's general policy in this regard solely on the basis of a possibility of delay in the arbitration process, particularly in that any such delay is unlikely to cause the complainant to suffer irreparable harm.

8. The application is hereby dismissed.

0511-76-U Jack P. Fogal, (Complainant), v. Toronto Typographical Union, Local 91, (Respondent).

Duty of Fair Representation – Ratification Vote – Whether the trade union may allow non-employee members to participate in a ratification vote – Effect of S63(4) and (5).

BEFORE: Ian C.A. Springate, Vice-Chairman, and Board Members P.J. O'Keeffe and N. Satterfield.

APPEARANCES: C.J. Abbass for the complainant, James Buller, Emil Rosenthal and Michael Diamond for the respondent.

DECISION OF THE BOARD: August 12, 1976

1. This is a complaint brought under section 79 of The Labour Relations Act alleging a violation of section 60 of the Act. Section 60 stipulates that a trade union shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of employees within a bargaining unit.

2. The complainant, who is a long service employee of CCH Canadian Limited, is a member of a bargaining unit for which the respondent trade union was certified as bargaining agent on January 28, 1976.

3. On May 26, 1967, following lengthy negotiations, the respondent and CCH Canadian Limited signed a memorandum of settlement. At a meeting of its membership held on May 30th, the respondent conducted a ratification vote with respect to the terms set out in the memorandum of settlement. The complainant, accompanied by Mr. Kenneth Renshaw, sought to attend this meeting. Neither of these gentlemen were members of the union, and on this basis they were refused admittance by Mr. James Buller, the respondent's president. A number of members of the respondent union who are not employees of CCH Canadian Limited were at the meeting and took part in the vote. The result of the vote was 31-2 in favor of ratification. It was the conduct of this vote which led to the filing of this complaint.

4. On June 27, 1976, subsequent to the filing of the complaint, the respondent union conducted a second ratification vote. Mr. Michael Diamond, the respondent's Vice-President, testified that the need for the second vote arose out of an amendment to the memorandum of settlement, although he admitted on cross-examination that another reason might have been the refusal of the union to admit non-members to the first vote. Whatever the true reason for the holding of the second vote, the meeting was open to non-members of the union who were employed at CCH Canadian Limited, and indeed a number of them took advantage of the situation and participated in both the vote and the discussions leading up to the vote. However, union members who were not employees of the company were also entitled to attend the meeting and to participate in the vote. Approximately fourteen non-employees, in fact, cast ballots. The outcome of this vote was 25-15 in favor of ratification.

5. Apart from his opposition to the manner in which the memorandum of settlement was ratified the complainant indicated that he was also opposed to the terms contained in the memorandum. His complaints in this regard, however, were limited to the fact that proof readers would continue to be paid less than "union scale", even though they would be receiving some increase in wages. The complainant is not himself a proof reader but rather works as a compositor. The terms of settlement do not require that the complainant become a union member as a condition of employment, nor do they require that he make any monetary payments to the union.

6. In so far as this complaint relates to the disallowance of the complainant and Mr. Renshaw from participating in the first ratification vote, it would appear that any shortcomings or failures there may have been were corrected by the holding of the second vote. This leaves unanswered, however, the question as to whether or not the respondent breached its duty of fair representation to the complainant, an employee within the CCH Canadian Limited bargaining unit, when it allowed its members who were employed at other locations to participate in the ratification vote.

7. The respondent trade union represents employees in the printing and publishing industry throughout Metropolitan Toronto and surrounding area. The evidence established that it bargains primarily on an industry-wide basis and that it is party to a master collective agreement binding upon some 25-30 employers. The union also holds bargaining rights for the employees of a number of other employers who are bound by separate agreements. It is clear that through its negotiations the respondent has established a recognized "union scale" for employees coming within its claimed jurisdiction against which the wages paid in any particular shop may be measured. Indeed in his testimony the complainant stated that in the past his wages as a compositor have always been "union scale plus 5 cents", whereas "proof readers have never gotten scale."

8. Mr. Diamond, in his testimony, stated that it has long been the respondent's policy to allow its members to take part in all ratification votes, even though they might not be directly involved. The only exception to this, he claimed, was that members of the union who were proprietors of their own shops were not permitted to vote. Although the respondent's bylaws do not deal directly with the conduct of ratification votes, nevertheless they do appear to contemplate the making of decisions on a membership-wide basis. For example, Article XIII section 2 of the bylaws stipulates that "a strike shall take place only when sanctioned by a majority vote of all members in good standing present at a meeting." Further, although union members working for a particular employer are grouped together as a "chapel", nevertheless Article XI section 7 stipulates that the members of a chapel may not take any action to in any way affect "the laws or contracts of the Union." Article IV section 2 of the respondent's constitution provided that at a union meeting "every member present shall vote on all questions, unless excused by the Union."

9. In his representations on behalf of the respondent Mr. Buller argued that the union's policy of allowing all members to take part in ratification votes was necessary to retain industry-wide standards. He further contended that the practice was justified in that a collective agreement negotiated at any one shop could have an indirect effect on the membership as a whole. Counsel for the complainant, however, took the position that the issue of the uniformity or otherwise of collective agreements should not affect the rights of employees of CCH Canadian Limited. He also raised the possibility that the ratification meetings could have been "packed" with non-employees of CCH Canadian Limited.

10. Counsel for the complainant also relied upon sub-sections 63(4) and (5) of the Act in support of his contention that the respondent was in breach of its duty under section 60. These two sub-sections, which are the only parts of the Act which refer to ratification votes, state as follows:

- (4) A strike vote or a vote to ratify a proposed collective agreement taken by a trade union shall be by ballots cast in such a manner that a person expressing his choice cannot be identified with the choice expressed.
- (5) Any vote mentioned in subsection 4 shall be conducted in such a manner that those entitled to vote have ample opportunity to cast their ballots.

Counsel contended that the reference in these sub-sections to "a person expressing his choice" and "those entitled to vote" refers to the persons protected by section 60, that is, to

employees in the bargaining unit. With respect, we cannot accept this position. Sub-sections 63 (4) and (5) refer to the conduct of ratification votes, they do not specify, even by implication, who shall have the right to vote. Indeed, if anything, the wording of these sub-sections is noticeable for their non-use of the term “employee”.

11. Although the employees in the bargaining unit are bound by the terms of a collective agreement (section 42) The Labour Relations Act makes it clear that it is the employer and the trade union that are the parties to the agreement (sections 37(2), 41 and 42). Further, the procedure adopted by a union in deciding whether or not certain proposals are to be accepted as the terms of a collective agreement is left to the union itself. This decision-making process may, but need not, involve the taking of a ratification vote. (See the *International Brotherhood of Boilermakers* case [1975] OLRB Rep. Oct. 758.) In the instant case the respondent has adopted a decision-making process which involves the taking of ratification votes at which all of its members are entitled to participate. There appears to be nothing to suggest that this form of decision-making process is inherently arbitrary, discriminatory or unjust and, thus, improper per se. Indeed in this type of situation, where all of the respondent’s members would be adversely affected should the “union scale” and other fairly standardized terms of employment be seriously undercut, there is some logic to allowing all of its members to, in fact, take part in the decision-making process.

12. Having concluded that the general procedure adopted by the respondent does not per se constitute a breach of section 60, there remains the question as to whether or not the respondent in this case implemented the procedure in a manner that was arbitrary, discriminatory or in bad faith. (In this regard see the *Diamond “Z” Association* case [1975] OLRB Rep. Oct. 791 where the Board ruled that with respect to the events surrounding a ratification vote the trade union in fact breached its duty of fair representation.) The evidence reveals that, at least at the second meeting, the memorandum of settlement was fully discussed before being voted on. Thus it cannot be said that the decision was taken arbitrarily. Further, there was simply no evidence to indicate that the persons who made the decision to ratify the memorandum were seeking to discriminate against all or any of the CCH Canadian Limited employees. On the issue of acting in bad faith, counsel for the complainant did raise the possibility that the meetings had been “packed” by the union with supporters of the memorandum. However, there was no evidence at all which might lead one to suspect this was the case. Indeed, the relatively small number of people attending both meetings seems to indicate that such did not occur.

13. There being nothing else which might suggest that the union acted in bad faith with respect to the manner of the taking of the vote, the Board concludes that the respondent has not breached its duty of fair representation.

14. It should be stressed that this result must be limited to the fact situation before us, namely a long standing general policy of the union to allow all members to participate in ratification votes, plus a lack of any evidence which might suggest that with respect to this situation the union acted with other than complete good faith and honesty of purpose. Had the evidence revealed a different fact situation it is, of course, quite possible that the Board would have reached an entirely different conclusion.

15. The complaint is dismissed.

0604-76-U Patrick Hann, (Complainant), v. Service Employees Union, Local 204 A.F.L.-C.I.O.-C.C.C., (Respondent), v. Baycrest Centre of Geriatric Care, (Intervener).

Adjournment – Evidence – Duty of Fair Representation – Whether Board will grant adjournment to complainant because it did not receive copy of respondent's reply – Whether Board will grant adjournment because of a witness's temporary physical difficulty in giving evidence – Whether Board will grant adjournment to allow complainant to produce witnesses unavailable because of vacations who could have been subpoenaed – Whether Board will adjourn pending an application for judicial review.

S60 – Whether Board will consider evidence of union conduct toward grievor regarding matters previously settled by agreement of the parties when hearing a subsequent application.

BEFORE: Kevin M. Burkett, Vice-Chairman.

APPEARANCES: *Daniel V. McCarthy and Patrick Hann for the complainant; J. Sack for the respondent; Ross Dunsmore and Elaine Zimmerman for the intervener.*

DECISION OF THE BOARD: August 12, 1976

1. This is a complaint filed under section 79 of The Labour Relations Act alleging a violation of section 60 of the Act. The complainant states that on or about the period January 1, 1976 the grievor was dealt with by the respondent trade union contrary to the provisions of section 60 in that the respondent failed to represent the grievor during the initial stages of the grievance procedure and refused to submit the grievance to arbitration. The complainant further alleges that the conduct of the agents of the respondent at a union meeting held May 12, 1976 was also proscribed by section 60 of the Act.

2. At the outset of the hearing in this matter counsel for the complainant requested an adjournment and set out three reasons in support thereof: these were, firstly the failure of two "crucial" witnesses to attend at the hearing, secondly, his failure to be supplied with a copy of the respondent's reply in this matter and, thirdly, the physical health of the grievor's wife, a potential witness who, although present at the hearing, was recovering from a bout of tonsillitis. Counsel for the complainant stated that the two persons who were not in attendance had informed him that they would be on vacation. He admitted that he had been notified by the Registrar on June 28, 1976 of the August 4, 1976 hearing date and that that date had been reconfirmed on July 19, 1976, subsequent to the failure of the Labour Relations Officer to effect a settlement of this matter. Counsel for the complainant admitted that the two persons who were not in attendance had been in Toronto during the month of July. Counsel, who had summonses prepared, did not serve these on the two persons because, by his own account "holidays are very important" and he did not wish to go through the "charade" of having the two persons served and then not appear.

3. Counsel for the respondent, who was present with a number of witnesses, and had been notified by counsel for the complainant on Friday, July 30th, of his intention to seek an adjournment, strenuously objected to the granting of the adjournment on the grounds cited by the complainant.

4. The second and third grounds put forward by the complainant in support of its request for an adjournment do not cause the Board to grant the request. The respondent argued that he had filed with the Board a pro forma reply (as is usually done in these cases) putting the complainant to the strict proof of its allegations. The Board did not receive the reply and as a result the complainant was not supplied with a copy. Nevertheless, as was stated at the hearing, the complainant's failure to be supplied with the reply does not as a matter of course require an adjournment. The effect is to limit the evidence going to the good character, conduct or propriety of the complainant which the respondent might wish to adduce or, at the very least, to entitle the complainant to an adjournment in the face of such evidence in order to prepare a defence. (See the *Statutory Powers and Procedures Act*, R.S.O. 19, Section 8). The Board also stated at the hearing that although it would not grant an adjournment because of Mrs. Hann's tonsillitis it would be tolerant of her condition and would be prepared to recess as required during her testimony.

5. The Board policy with respect to adjournments has been capsulized in the *Nick Misney* case [1968] O.L.R.B. Rep. 823 (upheld in the Ontario Court of Appeal, 70 CLLC 14,024) wherein the Board stated:

"...the Board's decision to deny the respondent's request for an adjournment was based on the Board's practice to grant adjournments only on consent of the parties or where the request is based on circumstances which are completely out of the control of the party making the request and where to proceed would seriously prejudice such party i.e., where it is proven that a witness essential to the party's case is unable to attend because of serious illness..."

The Board has held, in refusing to grant adjournments, that it is the responsibility of the complainant to do whatever is required to ensure that witnesses essential to its case are present at the hearing (see *Weston Bakeries* decision [1971] O.L.R.B. Rep. Jan. 30). The Board has further held that it is incumbent upon a party to properly prepare itself for a hearing which includes the obtaining and serving of the required summons (see: *Agilis Corporation Limited* decision [1971] O.L.R.B. Rep. Feb. 98). In the matter at hand counsel for the complainant chose not to serve summons on two witnesses whom he described as "crucial" to his case. He chose not to serve the two persons because he did not wish to interfere with their holidays. He argued that to have served them in the face of their holiday commitments would have been a "charade."

6. The purpose of a summons is to compel the attendance of witnesses at a hearing and as such it is an instrument which enables this Board to conduct its hearings at the appointed time and place and, more importantly, it is an instrument which provides a party with access to those witnesses who are essential to the presentation of its case. It is incumbent upon a party seeking the attendance of a witness(es) to avail itself of this instrument. Counsel can not decide against serving a potential witness, who has indicated that he will not attend, and then, in the face of the person's non-attendance, request an adjournment. If the Board (or any court for that matter) were to accede to such a request it would be inviting manipulation of its procedure causing undue delay and consequent prejudice to parties appearing before it. The Board, therefore, restates that in the circumstances of this case it has no alternative but to deny the request for an adjournment.

7. During the direct examination of Mr. P. Hann, the complainant and the grievor in this matter, an objection was raised with respect to the relevancy of the evidence adduced. The objection was with respect to evidence pertaining to the period prior to April 23, 1976 having regard to the fact that on that date the parties had settled a complaint arising out of the respondent's handling of Mr. Hann's grievance at the initial stages of the grievance procedure. A part of the complaint before us today involves, *inter alia*, the same alleged misconduct. The agreement, which was witnessed by a Labour Relations Officer appointed by the Board, is set out below:

"File No. 1841-75-U

Between:

Geraldine Hann, Complainant,

-and-

Service Employees Union
Local 204, Respondent.

AGREEMENT OF THE PARTIES:

The following shall constitute full settlement in this complaint.

1. The question of Arbitration for the grievance filed for Mr. Patrick Hann will be submitted for consideration at the next general membership meeting, or by other arrangements agreeable to the parties.
2. Mr. Hann will be notified by the Union of the time, date and place of such meeting.
3. The Complainant agrees to withdraw this complaint now pending before the Ontario Labour Relations Board without prejudice to commence further proceedings.

DATED at TORONTO this 23rd day of April, 1976.

For the Applicant

(Sgd.) Patrick Hann

For the Respondent

(Sgd. Alan Edge

Witness

(Sgd.) L. Stickland"

The parties agreed that the complaint referred to in the above "agreement of the Parties" dealt with the quality of representation afforded Mr. Hann by the respondent trade union in the processing of a grievance, and it is the alleged misconduct in respect of this grievance which is being raised, for a second time, in the instant application. Counsel for the complainant was attempting to lead evidence as to the circumstances surrounding the aforementioned grievance when the objection was raised.

8. The scheme of the Act [see section 79(1)(2)(3)] and the procedures of the Board are directed towards assisting the parties to resolve their differences short of a formal Board hearing. The Board is authorized to appoint a Labour Relations Officer to inquire into any complaint alleging a violation of the Act who, in turn, is authorized to attempt to effect a settlement of the matter complained of. Section 79(6) of the Act sets out the legal effect of a settlement arrived at by the parties prior to a formal hearing as follows:

“Where the matter complained of has been settled, whether through the endeavours of the labour relations officer or otherwise, and the terms of the settlement have been put in writing and signed by the parties or their representatives, the settlement is binding upon the parties, the trade union, council of trade unions, employer, employers’ organization, person or employee who have agreed to the settlement and shall be complied with according to its terms, and a complaint that the trade union, council of trade unions, employer, employers’ organization, person or employee who has agreed to the settlement has not complied with the terms of the settlement shall be deemed to be a complainant under subsection 1. R.S.O. 1970, c. 232, s. 79(6); 1975, c. 76, s. 21(2).”

9. Having regard to the agreement in writing signed by the parties on April 23, 1976, which constituted full settlement of the complaint as it was at that time and to the intent of section 79(6) of the Act, the Board ruled at the hearing that the complaint presently before it was limited, for purposes of making a determination on the merits, to the conduct of the respondent subsequent to April 23, 1976 and/or the respondent’s failure to comply with the terms of the settlement signed by the parties on that date. To have ruled otherwise would have been to undermine the dispute settlement mechanism as set out in the Act. The Board further ruled, however, that it was prepared to admit evidence of the conduct of the respondent prior to April 23, 1976 for the purpose of establishing the background and in order to give the Board the “flavor” of the dispute from the complainant’s point of view.

10. Counsel for the complainant promptly requested an adjournment so that he might seek judicial review of the Board’s ruling. The Board denied this request on the ground that it is not required to bring its proceedings to a halt because it has been served with a motion for judicial review much less because of the stated intention of counsel to pursue such a course. The governing authority in this regard is the decision of the Court of Appeal in the *Cedarvale Tree Services Ltd. and Labourers’ International Union*, Loc. 183 (1971) 3 of 832. (See also *Canadian Workers’ Union and Frankel Structural Limited et al* (unreported) a decision of the Ontario Divisional Court released June 13, 1975). Counsel for the complainant then advised the Board that he and his client were withdrawing from the proceedings. The Board advised counsel that such a course would result in a dismissal of the complaint. The Board’s advice went unheeded and the complainant withdrew from the proceedings.

11. Accordingly, the complaint is dismissed.

0485-76-U Canadian Workers Union, (Complainant), v. Canron Ltd., Eastern Structural Division, (Respondent).

Change In Working Conditions – S70 – Whether changing from cash method of salary payments to cheques a violation.

BEFORE: Kevin M. Burkett, Vice-Chairman, and Board Members H. Simon and W.H. Wightman.

APPEARANCES: *Larry Haiven for the complainant; James Hassell for the respondent.*

DECISION OF THE BOARD: August 10, 1976

This is a complaint filed under Section 79 of the Act in which the complainant alleges that it has been dealt with contrary to the provisions of section 70 of the Act.

2. The relevant facts in this matter are straight forward and can be summarized as follows: the complainant trade union was certified as bargaining agent for the shop employees of the respondent company on January 22, 1976 and immediately thereupon served notice on the respondent company of its desire to bargain with a view to concluding a collective agreement. The company replied and shortly thereafter negotiations commenced and have continued up to this date. The parties are agreed that the complaint is a timely one within the requirements of Section 70(1) of The Labour Relations Act. The evidence establishes that on or about March 5, 1976 the company unilaterally altered the long standing practice of paying its employees in cash and instituted a payment by cheque system which caused the union to write to the company as follows:

“Dear Sir:

It has come to our attention that you have recently abruptly stopped an established practice of some twenty years standing – “paying your employees in cash. This practice, as you know, was set down in Section 11 of your collective agreement with Local 743, International Association of Bridge, Structural and Ornamental Ironworkers.

This action on your part was not explained and done with less than one week’s notice. It has angered the workers and caused them some considerable inconvenience, especially in paying dues to their union, which they are accustomed to doing in cash on payday, not to mention banking problems for dayshift workers.

In the interest of good industrial relations, we request that you reinstate the method of payment in cash. We await your reply forthwith.”

The company in its reply dated March 16 indicated that in the absence of employee complaints it did not foresee returning to the old system of payment of wages in cash. The complainant alleges that the above noted change from payment in cash to payment by cheque constitute a change in working conditions and/or terms of employment as contemplated within the meaning of Section 70(1) of the Act.

3. Section 70(1) of the Act reads as follows:

“Where notice has been given under section 13 or section 45 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition or employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

- (a) until the Minister has appointed a conciliation officer or a mediator under this Act and,
 - (i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or
 - (ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board, as the case may be; or
- (b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first. R.S.O. 1970, c. 232, s. 70(1)”

4. The underlying purpose and meaning of this section has been well stated in the *Canadian General Electric Company Limited* case [1965] OLRB Rep. Dec. 649 where at page 652 the Board stated:

An important question which arises in this proceeding relates to the scope and meaning of the words “*alter the rates of wages or or any other term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees*”. In our opinion, it is manifest that the aim and policy of this section is directed to the protection of the union’s bargaining rights and the promotion of effective and meaningful collective bargaining. Once the notice to bargain is given, the section operates to prohibit all alterations without the union’s consent, *whether they be beneficial or detrimental to the employees concerned*, of their wages or other terms or conditions of employment, including any right, privilege or duty of the employer. The section seeks to protect the union’s bargaining rights and to promote effective collective bargaining by preserving and maintaining the union’s bargaining position for the period stipulated on the basis of the contracts of employment existing between the employer and the employees of the date of the notice. In other words, the legislation is directed at maintaining the *status quo* of the wages and other terms and conditions of employment existing under the contracts of employment between the employees and their employer, during the particular period of time stipulated in the section. The union is, therefore, given the opportunity, during this time, to enter upon negotiations and to bargain for a collective agreement, having regard to a fixed point of de-

parture, namely the wages and working conditions existing at the time of the notice.

(See also *Re Ottawa General Hospital* case [1972] OLRB Rep. June. 681); the section is designed to promote efficacious collective bargaining by maintaining the status quo and thereby providing a set of parameters; a fixed point of departure. The section also reinforces the agency status of the trade union by requiring the company to deal with the trade union if it wishes to alter any term or condition of employment or any right, privilege or duty.

5. Whereas the union in this matter adduced evidence as to the detrimental effects of the change in the method of payment the company in its cross examination (it did not call any direct evidence) attempted to focus on the beneficial aspects of the change, both from the point of view of the company and of the employees. The section makes no reference to the effect of any alteration whether it be beneficial or otherwise, nor does it make any reference to the bona fides of the motive for the alteration. The freeze is a blanket one and the Board confirms its oral ruling, given at the hearing, that evidence as to motive or effect is irrelevant for purposes of making a determination under Section 70(1) of the Act.

6. The evidence establishes the fact that a change in the method of payment was made without the consent of the union and as a result the relevant consideration is whether that change constituted a change or alteration within the meaning of Section 70(1) of the Act. Counsel for the respondent argued that what had transpired was a change in procedure only which did not come within the ambit of the section and cited the *City Parking* case [1968] OLRB Rep. Jan. 1038 in support of this proposition. He argued that the employees were receiving the same amount of payment and therefore there was no substantive change as would bring into force Section 70 of the Act. The Board has read the *City Parking* decision (*supra*) and acknowledges that the Board found in that case that the company's unilateral change in the method of cash handling, which incidentally required employees to be bonded, was a change "of working procedure and not a change in the actual working conditions of the attendants", the Board in that case did not elaborate on the distinction between a working procedure and a term or condition of employment. Whereas this Board accepts that there may be working procedures which are not terms and conditions of employment within the meaning of Section 70(1) of the Act, the Board asserts that the use of the words "or any right, privilege or duty, etc." is designed to "freeze" all aspects of the employment relationship and as a result there are many procedures which clearly fall within the ambit of Section 70(1). Job-posting and lay-off procedures which are "frozen" in accord with Section 70(1) of the Act. As a result, even if we were of a mind that the method of wage payment was a procedure as distinct from a term or condition of employment, which we are not, we would not dismiss the complaint for that reason alone.

7. Section 70(1) does not distinguish between major and minor terms and conditions of employment and whereas the method of wage payment may not be a significant term or condition of employment, the fact that it is often a matter of negotiation between the parties to a collective agreement lends credence to the argument that it is a procedure which falls within the ambit of Section 70(1). Employees have an interest in the method of payment, the time of payment and the time lag between hours worked and payment. Having regard to the purpose of the section as set out in paragraph 4 herein, the Board is compelled to find that the unilateral alteration in the method of payment of some twenty years' standing was an alteration of a term or condition of employment as proscribed by Section 70(1) of the Act.

The Board makes this finding notwithstanding whatever bona fide motive precipitated the change.

8. The Board is assisted in reaching this decision by Article 11(A) of the collective agreement which was in existence between the respondent company and the then incumbent Iron Workers Union prior to the certification of the applicant union. Article 11(A) of the collective agreement referred to above, which covered the same employees presently represented by the Canadian Workers Union, provided that:

“Employees shall be paid on a regular designated pay day once each week in cash during their working hours. When an employee is discharged he shall be paid off immediately in cash or by cheque. When an employee is laid off, the Company shall forward by registered mail, all money owed, to the last recorded address of the employee within two regular work days following the date of separation.”

Having regard to the definition of collective agreement as set out in Section 1(1)(e) of the Act, and to the fact that the provision for payment of wages in cash was set out in the collective agreement between the respondent and the displaced trade union, and was in existence at the time the union served notice to bargain, the Board must find that the company violated the act in unilaterally instituting the payment by cheque system.

9. Accordingly the Board directs the company to forthwith return to the payment by cash system which was in existence at the time the union served notice to bargain.

0498-75-R United Steelworkers of America, (Applicant), v. Hodgson's Steel & Ironworks Limited,(Respondent), v. Group of Employees, (Objectors).

Evidence – Whether person a director of respondent – S1(3)(b) – Effect of Limited Company Search showing respondents last annual return listed person as a director – Effect of provisions and requirements of the Corporations Information Act 1971D4, S.O. 1971, c. 27.

BEFORE: George W. Adams, Vice-Chairman, and Board Members F. W. Murray and P.J. O'Keeffe.

DECISION OF GEORGE W. ADAMS, VICE-CHAIRMAN, AND BOARD MEMBER F.W. MURRAY: August 4, 1976

1. This is a request for reconsideration of the Board's decision dated May 25, 1976 wherein it was determined that Frank Benest, Wayne E. Hodgson, Trent Hodgson, Ronald G. Anderson, and David Milne were employees within the meaning of the Labour Relations Act; that Lenna Tonet, Shirley Higgs and Garry Hodgson were not. The Board's decision went on to direct that a representation vote be taken of the employees in the bargaining found to be appropriate. The applicant had requested certification under Section 7(4) of *The Labour Relations Act* (the case arose before July 18, 1975) but the Board dismissed the re-

quest because the applicant had insufficient membership support in the bargaining unit to trigger the provision. The subsection required "more than 50 per cent of the employees in the bargaining" be members of the trade union and the applicant had filed only nine membership cards on behalf of the nineteen employees found by the Board to be employed in the unit as of the date of the application for certification.

2. The request for reconsideration appears restricted to the Board's determination with respect to Wayne E. Hodgson and its decision to dismiss the applicant's request under Section 7(4).

3. Throughout this matter, the applicant has contended that Wayne E. Hodgson is a director of the respondent company and, for that reason, should be excluded from the bargaining unit. Prior to the hearing of April 6, 1976, the applicant requested the respondent to produce its minute book and share register at the hearing, but was advised that the respondent could not locate it. However, during Mr. Ryder's cross-examination of Wayne E. Hodgson, Mr. Frederick Hodgson voluntarily interjected that the respondent's solicitors in Niagara Falls had duplicate copies and, before the Board, it was arranged that a representative of applicant, Mr. Marshall, would have access to those documents subsequent to the hearing, and the Board would reconvene if Mr. Marshall's examination revealed relevant information additional to the evidence addressed at the hearing. During the cross-examination of Mr. Wayne Hodgson, Mr. Ryder asked him if he knew that the corporate return filed by the respondent with the Provincial Government listed him as a director and General Manager and he replied that he did not. He also denied attending any meeting of directors or corporate officers or having signed any papers in either capacity. The last witness was Mr. Frederick Hodgson, President of the respondent company. He testified that Wayne Hodgson was never told he was a director of the company; nor had he ever attended meetings of directors or acted as General Manager. He testified that in 1970 or 1971 the will of his father was probated, and at that time it was discussed whether a particular share should be split between Wayne and Gary Hodgson. It was decided to transfer the share to Gary Hodgson. Mr. Fred Hodgson went on to testify that from that time forward a mistake was made in listing Wayne Hodgson as a director. However, he told the Board that the mistake was corrected in March 1975 but admitted that "the return and minute book list him as a director". Finally, he introduced a document dated April 5, 1975, under corporate seal, bearing the signature of May E. Hodgson, Secretary, and listing Frederick Nelson Burrow Hodgson, May Elizabeth Hodgson and Gary Lennox Hodgson as President, Secretary, and Treasurer, respectively, and as the only directors and shareholders as of June 20, 1975 (the date of this application for certification).

4. Mr. Ryder did not object to the introduction of the document bearing May Elizabeth Hodgson's signature and did not cross-examine Mr. Frederick Hodgson with regard to his statement that the mistake in listing Wayne Hodgson as a director was corrected in March 1975. As well, Mr. Ryder did not examine Mr. Hodgson about the date on which the last minutes of company had been prepared. Mr. Ryder did file a xeroxed document entitled "Unique Services - *Limited Company Search*" and the contents of the document are reproduced in Board Member O'Keeffe's earlier dissent. This document had a Ministry of Consumer and Commercial Relations receipt attached to it for \$2.00. The document appears to say that the last annual return of the respondent was dated January 10, 1975 and that Wayne Everett Hodgson is a director and general manager.

5. Sections 3(1)(f) 3(5), 7, 8, 11(d), and 12 of *The Corporations Information Act* 1971 S.O. 1971, c. 27 read:

“3 (1) Within two months after each anniversary, following the date upon which this section comes into force, of the date of its incorporation or amalgamation every corporation having its head or other office or carrying on any business, activity or service or a part thereof in Ontario, unless of a class exempted by the regulations, shall make out, verify and file with the Minister a return setting out as of the anniversary of the date of its incorporation or amalgamation,

- (f) The names and residence addresses, giving street and number, if any, of the directors and the date on which each became a director;

3 (5) Every corporation to which subsection 1 applies shall file with the Minister a notice of every change in the membership of its board of directors within fifteen days after the change has taken place, and the notice shall specify the date upon which each person became a director or ceased to be a director, as the case may be, and the residence address, giving street and number, if any, of each such person.

7 (1) Every person who makes a statement in any document, material, evidence or information submitted or required by or for the purposes of this Act that, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact or that omits to state any material fact, the omission of which makes the statement false or misleading, is guilty of an offence and on summary conviction is liable to a fine of not more than \$2,000 or to imprisonment for a term of not more than one year, or to both, or if such person is a corporation to a fine of not more than \$20,000.

7 (2) No person is guilty of an offence under subsection 1 if he did not know that the statement was false or misleading and in the exercise of reasonable diligence could not have known that the statement was false or misleading.

7 (3) Where a corporation is guilty of an offence under subsection 1, every director or officer of such corporation who authorized, permitted or acquiesced in such offence is also guilty of an offence and on summary conviction is liable to a fine of not more than \$2,000 or to imprisonment for a term of not more than one year, or to both.

8 (1) Every person who,

- (a) contravenes this Act or the regulations; or
- (b) fails to observe or comply with any order, direction or other requirement made under this Act or the regulations,

is, except where such conduct also constitutes an offence under section 7, guilty of an offence and on summary conviction is liable to a fine of not more than \$2,000 or, if such person is a corporation, to a fine of not more than \$20,000.

8 (2) Where a corporation is guilty of an offence under subsection 1, every director or officer of such corporation, and, where the corporation is an extraprovincial corporation, every person acting as its representative in Ontario, who authorized, permitted or acquiesced in such offence is also guilty of an offence and on summary conviction is liable to a fine of not more than \$2,000.

11 The Minister may issue a certificate certifying,

- (d) that any person named in the certificate on the date or during the period specified in the certificate is shown on the records of the Department as a director, officer, manager or attorney for service of the corporation named in the certificate.

12 (1) Where this Act requires or authorizes the Minister to issue a certificate or certify any fact, the certificate shall be issued under the seal of the Minister and shall be signed by him or by such officer of the Department as is designated by the regulations.

12 (2) Any certificate purporting to be under the seal of the Minister and signed by a person authorized by or under subsection 1, or any certified copy, is receivable in evidence in any action, prosecution or other proceeding as *prima facie* proof of the facts so certified without proof of the seal or of the signature or the official position of the person appearing to have signed the certificate."

6. Although the Board's decision of May 25, 1975 does not make reference to this legislation, it is the governing statute for the corporate information filed with the Ministry of Consumer and Commercial Relations and the Board's reasoning in light of the evidence is not inconsistent with its requirements.

7. Section 3 imposes a duty on a corporation to file with the Minister of Financial and Commercial Affairs (now Consumer and Commercial Relations) the names and residence addresses of its directors. Section 7 makes it an offence to file a statement which is false or misleading at the time it was made, and Section 8 makes it an offence to fail to observe a requirement of the Act. Section 11(d) allows the Minister to issue a certificate certifying that any person named in the certificate on the date or during the period specified in the certificate is shown on the records of the Department as a director of the corporation named in the certificate. And Section 12 stipulates that a certificate, under the seal of the Minister, will bear a signature of the Minister or other officer of the Department as is designated by the regulations, and any certificate so executed is receivable in evidence in any proceeding as *prima facie* proof of the facts so certified without proof of the seal or of the signature.

8. The document submitted by Mr. Ryder, through an employee of his law firm, Mrs. Welsh, does not contain the seal of the Minister or a signature of the Minister or other official of the Department. But be that as it is, she testified that she went to "Queen's Park – Companies Branch" and compared Mr. Ryder's document with what was on file there with respect to the respondent corporation. She said the information was identical.

However, the information contained in Mr. Ryder's document pertains to a corporate return dated January 10, 1975 and Mr. Hodgson said the mistake was corrected in March 1975. Moreover Mr. Hodgson introduced a document purportedly signed by the secretary of the respondent, which contains the names of persons said to be the directors of the respondent as of June 20, 1975. Mr. Hodgson did admit that the minutes of the last director's meeting would show Wayne Hodgson as a director, but the Board was never told when those minutes were prepared and Mr. Marshall did not attend the offices of the respondent's solicitors to ascertain this fact. Thus, on the evidence before the Board, Mr. Hodgson's admission in regard to the minutes was not inconsistent with his assertion that the mistake had been corrected in March 1975, although Mrs. Welsh's testimony indicates that the respondent corporation did not amend its 1975 return in correcting the mistake. Accordingly, on the evidence before it, the Board was satisfied that the applicant did not prove that Wayne Everett Hodgson was a director of the respondent on June 20, 1975. Furthermore, while not considered at the time of decision, the Board is satisfied that its decision is not contrary to subsection 2 section 12 of *The Corporations Information Act, 1971*, assuming that Mr. Ryder's evidence comes within the meaning of that subsection. This is so in that the subsection stipulates that the certificate is *prima facie* proof of the facts so certified and *Circle Film Enterprises Inc. v Canadian Broadcasting Corp.* (1959) 20 DLR (2d) 211 (S.C.C.) holds that such a certificate only binds a tribunal "in the *absence* of any evidence to the contrary" (emphasis added). In the facts at hand, the Board had before it evidence to the contrary which, on balance, it preferred to the information contained in Mr. Ryder's document.

9. This having been the basis to the Board's decision, and having regard to the Board's strict approach to requests for reconsideration, the applicant's request must be denied. The Board did not overlook Frederick Hodgson's admission that the minutes would show Wayne Hodgson as a director. This admission was not inconsistent with his statement that the mistake was corrected in March 1975. Mr. Ryder had the opportunity to cross-examine Mr. Hodgson on this assertion but did not do so. Therefore the statement went unimpeached. The applicant, through Mr. Marshall, had the opportunity to examine the minutes after the Board's hearing on April 6 but did not do so. Mr. Ryder submits that the applicant abandoned this opportunity in reliance on Mr. Hodgson's admission, and that was its choice. Having regard to all the circumstances, the Board is of the opinion that the applicant must accept the consequences of this abandonment. Finally, in light of the Board's finding that Wayne Hodgson was not a director as of the date of application for certification, the relevance of section 132(1) of *The Business Corporation Act* does not arise.

10. It may be that the respondent has violated *The Corporations Information Act* by failing to amend its return, but procedures are contained in that Act for its enforcement. We would also note that even if the Board had decided that Wayne Hodgson was to be excluded from the bargaining unit, the applicant would still lack sufficient membership in the bargaining unit to trigger section 7(4).

11. The request is denied and the Board directs that the ballot box be unsealed and the ballots counted.

DECISION OF BOARD MEMBER P.J. O'KEEFE:

Having already set forth my position in this case in my decision of May 25, 1976, I have nothing further to add to that decision.

1914-75-R Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant), v. Dominion Stores Limited, (Respondent).

Employee – S1(3)(b) – Whether Bakery Store Managers excluded.

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members N.B. Satterfield and R.H. White.

DECISION OF KEVIN M. BURKETT AND R.H. WHITE: July 21, 1976

1. An application for certification on behalf of all bakery store managers of the respondent at its retail stores in Sault Ste. Marie was filed by the applicant on March 29, 1976. A dispute arose at the hearing as to the status of the bakery store managers as employees under The Labour Relations Act and accordingly the Board in a decision dated April 15, 1976 appointed a Labour Relations Officer to inquire into the duties and responsibilities of those in the classification of bakery manager. The Board has now reviewed the report of The Labour Relations Officer and the representations of the respondent in respect thereof.

2. Section 1(3)(b) of the Act states:

“1. (3) Subject to section 80, for the purposes of this Act, no person shall be deemed to be an employee,

(b) Who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.”

3. The effective operation of the system of labour relations which presently exists in this jurisdiction is based on an underlying recognition of the inherent differences between employer and employees and a need for an arm's length relationship between the employer, as embodied by those who exercise managerial function or are employed in a confidential capacity in matters relating to labour relations, and the employees. The purpose of Section 1(3)(b) of the Act is to ensure that persons who in the opinion of the Board exercise managerial functions or are employed in a confidential capacity do not find themselves faced with a conflict of interest because of their inclusion within a bargaining unit of other employees. Persons who exercise such functions are deemed not to be employees pursuant to section 1(3)(b) of the Act and as a result are denied access to the collective bargaining proc-

ess. In view of this remedial aspect the onus is placed on the party seeking to exclude a person from the operation of the Act to satisfy the Board of the exercise of managerial functions.

4. The Board has seen fit to exclude as managerial, not only persons who make independent decisions with respect to policy and the running of an organization but also, having regard to the underlying purpose of the section, persons who can materially effect the terms and conditions of employment of other employees. The evidence is clear that Mr. Geddes, the bakery manager examined in the instant case, does not become involved in policy or independent decision making as it relates to the management of the respondent company or the operation of the bakery. The bakery managers do not become involved in decisions with respect to budgeting, capital outlay or the future development of the respondent company. With respect to the bakery, the products produced, the ingredients and baking formulas and the prices charged are all determined by head office as is the “man hour structure” which sets out the number of man-hours which the company will permit in a department. The “man-hour structure” relates to the sales volume of the department. The store hours are also determined by head office. The bakery manager does not have a power of independent decision making with respect to the operation of the bakery. All matters of consequence are predetermined by the company head office.

5. There are eight persons assigned to the Bakery department “managed” by Mr. Geddes. They include persons in the classifications of baker, counter girl, wrapper and decorator. Mr. Geddes testified that he supervises, instructs and assigns work to these persons. The Board accepts this evidence but has taken particular note of the fact that the head office supplies the formulas and the variety book and as a result must conclude that the supervision and instruction are somewhat circumscribed. The Board would point out, however, that it does not exclude a person from the operation of the Act on the basis of supervisory function, circumscribed or otherwise as borne out by the traditional inclusion within the bargaining unit of the “lead hand” and by the “white collar” cases. The Board must determine if the supervisory duties in combination with other responsibilities enable a person, either directly or by means of “effective recommendation”, to affect the terms and conditions of employment of other employees. (See *McIntyre Porcupine Mines Limited* case [1975] OLRB Rep. Apr. 261 at page 297). The Board has examined the evidence and has concluded that the Bakery managers do not exercise managerial function within the meaning of section 1(3)(b) of the Act.

6. The persons employed in the bakery department are covered by a subsisting collective agreement which sets out the terms and conditions of employment including wages, benefits, holidays with pay, vacations, seniority and grievance procedures. The bakery managers do not participate in the negotiations nor are they involved in the grievance procedure. The bakery managers can grant short periods of time off but all leaves of absence are processed through the regional personnel office. The bakery managers set the work schedules but these are subject to the “man-hour structure” which also determine the complement and indirectly occasion the lay-off of employees. Mr. Geddes stated that he makes the lay-off decision but also submitted:

“If the person has the *least seniority* and doesn’t present a problem I may have to deal through the union or the store manager, to find out whether I can do it or not.”

Although Mr. Geddes testified that he has the authority to assign overtime and has done so, he acknowledged that he had been told by the store manager at different times that no one was to authorize overtime. Mr. Geddes does not assign vacation times nor does he make any written assessment of the employees in the bakery department.

7. Although Mr. Geddes testified that he has the authority to hire employees and gave as an example the hiring of Richard Boucher, he admitted that if the store manager had disagreed with the placing of Mr. Boucher on payroll he would not have been hired. Furthermore, Mr. Bruno Temeline, the store manager who was called by the respondent company to give evidence, testified that the store manager makes the decision as to who will or will not be hired. Mr. Geddes admitted that the placement of someone to work behind the bakery counter is determined by the union seniority list. Mr. Geddes testified that he has the authority to discipline other employees. It would appear that the discipline imposed by Mr. Geddes has been primarily restricted to verbal warnings although the evidence establishes that on one occasion he terminated an employee. Mr. Geddes testified that he reported this action to the store manager not to gain final authority but to inform him. This testimony is inconsistent with the circumscribed authority of Mr. Geddes in all other areas as brought out in evidence. It can perhaps be explained, however, by the fact that the store manager has the opportunity to overrule or affirm actions taken by department managers (some of whom are in the bargaining unit) at the first step of the grievance procedure. Step one of the grievance procedure as set out in the collective agreement between the parties provides that:

“The employee concerned and a Union Steward or Union Representative may within five (5) working days of the alleged occurrence said to have caused the grievance, take the matter up with the Store Manager who shall give his answer within three (3) working days. The Store Manager and a Union Steward will confirm in writing that a Step One meeting had taken place, showing, on a form to be supplied by the company, the store, date, grievor’s name, and indicate that a verbal Step One meeting had been held. This form will be signed by the Store Manager and the Grievor. If the grievance has not been satisfactorily settled, then –”

8. The bakery managers do not exercise duties and responsibilities which enable them to materially affect the terms and conditions of employment of other employees of the respondent so as to create a conflict of interest if there were to be given access to the collective bargaining process. The responsibilities of the bakery managers can be likened to those of the “lead hand” in the industrial setting and as such the Board is not prepared to find on the basis of their duties and responsibilities as of the date of this application, that the bakery managers exercise managerial function within the meaning of section 1(3)(b) of the Act.

9. The Board finds that all employees of the respondent in its retail stores at Sault Ste. Marie, Ontario, save and except store managers, assistant managers, persons above the rank of assistant manager, district office staff, persons employed for not more than twenty-four hours per week, persons employed during the school vacation period and persons covered by a subsisting collective agreement between the applicant and respondent, constitute a tag end unit of employees of the respondent appropriate for collective bargaining.

10. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on April 6, 1976, the terminal date fixed for this application and the date which the Board determines under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

11. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER N.B. SATTERFIELD:

I would dismiss the application for certification of bakery store managers of the respondent at its retail stores in Sault Ste. Marie because they exercise managerial functions within the meaning of section 1(3)(b) of the Act. This conclusion is based on the following facts and arguments derived from examination of the evidence in the report of the Labour Relations Officer.

1. The Bakery Store Managers regularly supervise the bakery store employees in the following matters:

- (a) assigns daily duties;
- (b) evaluates the quality of employees' performance in these duties;
- (c) instructs them;
- (d) hires new employees;
- (e) terminates employees;
- (f) assures they follow established time recording procedures and attend at their jobs for the required time each day;
- (g) grants permission for requested time off up to one day;
- (h) Assigns and authorizes overtime;
- (i) schedules the days and hours of work of the employees.

The testimony of William Geddes is that he supervises in the above manner eight employees in four classifications. By his own words, he is supervising "All the time I'm there..." His performance of work covered by the subsisting collective agreement is limited to filling in for his employees on their jobs. The Bakery Store Managers get much of their authority and supervision from "...Bakery Supervision in Head Office" (Toronto), and the balance from their Store Managers. The Bakery in a store is separated from the rest of the store and is a self-contained unit. Therefore, both sources of supervision available to the Bakery Store Managers may be said to be remote and indirect, rather than immediate and direct. Given the nature of the supervision which they exercise and the sources of their own supervision, they can hardly be held to be –

“... merely a conduit carrying orders or instructions from management to the employees, ...”

in the words of the Board in the *Falconbridge Nickel Mines Limited*, case [1966] OLRB Rep. 379. That decision in referring to positions in dispute re their managerial nature states in part as follows:

“... if a person is primarily engaged in supervision and direction of other employees and has effective control over their employment relationship, even though the person occasionally performs work similar to the rank and file employees ... to relieve an employee during occasional periods of absence ..., such occasional work in no way derogates from his prime function as a person employed in a managerial capacity.”

The Bakery Store Managers are ‘primarily engaged in the supervision and direction of other employees’. The two stores with bakery units employ 14 full-time and 7 part-time employees. Mr. Geddes’ evidence is that he does not spend more than 50% of his time doing work of a non-supervisory nature. If the Managers were not spending the rest of their time supervising, it would not make sense to have them there. The nature of their supervisory responsibilities and the physical and organizational environment in which they must exercise it puts them in a conflict position with the employees in their charge. Therefore the decisions they make do materially affect the conditions of employment of other employees.

2. In addition to managerial responsibilities associated directly with the supervision of other employees, the Managers perform other tasks ordinarily associated with managerial responsibility such as: ordering all supplies for the bakery without having to seek prior approval or direction; assuring that the required mix of product is produced; the correct product formula is used; and the proper manning levels are maintained according to the level of output and the manhour structure (i.e. budget). Mr. Geddes has a key to the store and is free to enter it at any time, as distinct from having the key so he can share in the opening and closing of the store as is the case with non-managerial employees.

3. The Bakery Managers are also distinguished from the employees whom they supervise in respect to certain working conditions. They are paid a regular salary; are not deducted pay for time off; are not paid overtime; schedule their own hours; and only notify the Store Manager if taking time off.

4. I disagree with the conclusions reached in the majority decision at paragraph 4 that “All matters of consequence are predetermined by the company head office,” and at paragraph 8 that “the responsibilities of the bakery managers can be likened to those of the ‘lead hand in the industrial setting.’” It is quite clear that these managers have their responsibilities circumscribed by procedures laid down from head office in respect to budgeting, pricing, manhour structures, store hours, formulas and variety books; from district personnel office in respect to leaves of absence; and by the subsisting collective agreement in respect to wages, overtime, discipline and transfers from part-time to regular employment.

However, as earlier stated in paragraph 1, much of their own supervision is from the remoteness of head office which, coupled with separateness of their units in the stores and the limited form of supervision received from the Store Managers, means someone with more authority than that usually associated with a "lead hand" must be responsible to assure that all of the policies and procedures are properly applied at the local level. In fact Mr. Geddes supervises a lead hand who is responsible to him for the night shift operation. The Store Managers are clearly not responsible for the bakery units in respect to particular head office procedures such as budgets, manhour structures, formulas and variety books and they exercise no authority over the ordering of supplies. If the Bakery Store Managers were to be determined as non-managerial within the meaning of Section 1(3)(b) of the Act, it would mean the Store Managers and Assistant Store Managers, in the two stores having bakery units, alone would hold managerial responsibility. These two stores have a total of 191 full-time and 119 part-time employees. By the sheer size of the work force alone, it would impose an unreasonable expectation for a Manager and Assistant Manager in one store and a Manager in the other to provide the only "non-bargaining unit" supervision, notwithstanding the fact that store Department Managers are included in the existing unit. Furthermore, the Store Managers themselves have their responsibilities circumscribed in an almost identical manner to the Bakery Store Managers. If it is held that such limiting of supervisory function places those jobs within the Act, this conjures the absurd situation of the stores in question being supervised from district or head office.

I endorse the representations of counsel for the respondent in that "... the evidence taken as a whole demonstrates that the Bakery Managers exercise discretionary powers which exclude them from the Act." On page 4 of counsel's written representations starting in the second paragraph, counsel sums up the totality of the situation as being that, in addition to the specific indicators of managerial status,

"They are responsible to the Company for the operation of an entire enterprise – the Bakery unit. It is an operation which, to a significant extent, operates independently of the main store. There is no interchange of employees between that Department and the rest of the store. The Bakery area is isolated from the store, and the employees enter 'through a door which separates it from the main store.' All the necessary equipment is in the Bakery area. A separate budget is established for that Department. It is the responsibility of the Bakery Manager to see to it that the budget is adhered to and that the Company's profit margin is maintained. He does this by exercising his own judgment and is not given 'any direction in operating the bakery by the Store Manager'. Most of the directions he receives from senior management appear to come straight from Head Office rather than from the Store Manager. This is true of such important matters as the type of product manufactured, the formula for the product, prices, manhour structure, and operating hours.

The Bakery Manager is in charge of the operation of the Company's Bakery unit. To the extent that managerial responsibilities are needed, Mr. Loucks and Mr. Geddes exercise them. They make decisions crucial to the successful and profitable operation of the Company's bakery business. Their responsibility to the Company inherently places them in a conflict position with other employees."

The Board, in dealing with the difficult application of the “effective control” test of managerial status, stated in part in the *McIntyre Porcupine Mines Limited* case [1975] OLRB Rep. April 261 at paragraph 31:

“... it is in this area that the Board has most often said it will look at the ‘totality’ of the evidence in making its determination. And in this light one ‘effective’ function is unlikely to be sufficient to activate Section 1(3)(b) although this, of course, depends on the nature of the function. On the other hand, the totality approach means that the trappings of managerial status, as opposed to actual functions, are relevant. These trappings (offices, salaries, etc.) may indicate the perspective or intent of the particular parties before the Board and this intent is of assistance when the other indicia of managerial capacity are in balance.”

I would cite also the case of *Parker’s Dye Works and Cleaners Ltd.* [1974] OLRB Rep. Dec. 859. At paragraph 8 in dealing with the disputed status of a Store Manager, Mrs. Audrey Martin, whose functions were substantially more directed to doing the work of the bargaining unit than is so in the instant case, the Board states

“The Board cannot disparage responsibilities that are integral to the business operation of the intervener (i.e. employer) having regard to the organizational structuring of the intervener’s retail outlets. We find therefore that Mrs. Martin exercises managerial functions within the meaning of Section 1(3)(b) of the Act.”

In this instant case the Bakery Store Managers do not exercise an independent decision making authority in regards to policy, but they do have limited decision making authority over the overall operation of the bakery units, but these limitations taken in the whole context within which the units operate are reasonable and do not denude the managerial responsibilities so as to place them outside the meaning of Section 1(3)(b). They are responsible for the day-to-day operation of the bakery units and exercise a supervisory function over 14 full-time and 7 part-time employees working in the units. The Managers have keys to their stores and may enter them at any time and have responsibility for their units which is separate and distinct from the managers of their stores. In this context and on viewing the totality of the evidence in respect to the bakery units, it must be found that the Bakery Store Managers exercise managerial functions within the meaning of Section 1(3)(b) of the Act.

0517-76-R Edward R. Kantowicz, (Applicant), v. Carleton University Academic Staff Association, (Respondent), v. Carleton University, (Intervener).

BEFORE: D. H. Kates, Vice-Chairman, and Board Members H. J. F. Ade and H. Simon.

DECISION OF THE BOARD: August 10, 1976

1. This is an application filed under section 50 of The Labour Relations Act alleging that the respondent at the material time of its organizational campaign to acquire bargaining rights on behalf of the intervener's academic staff succeeded in obtaining a certificate by means of fraud. The relevant provision of the Act reads as follows:

Fraud – Whether trade union committed a fraud by promising during membership campaign that employees could freely opt out of trade union and then, after certification, negotiating a “Rand Formula” security clause – Whether restricting list of acceptable charities for payment of dues equivalent a fraud in light of promise that payment could be made by employees to a charity of their choice – Whether trade union's promise that employees could freely opt out a fraud when negotiated agreement provided a conscientious objector test.

“s.50 If a trade union has obtained a certificate by fraud, the Board may at any time declare that the trade union no longer represents the employees in the bargaining unit and, upon the making of such a declaration, the trade union is not entitled to claim any rights or privileges flowing from certification and, if it has made a collective agreement binding upon the employees in the bargaining unit, the collective agreement is void.”

2. At the hearing in this matter scheduled for July 4, 1976 the parties filed correspondence and other documents with the Board with respect to the circumstances precipitating the filing of the application. For purposes of expediting the processing of this application, the parties agreed that the filings and the alleged misleading statements made by the respondent's representatives during the course of the campaign ought to be assumed to be true. In other words, even assuming that the particulars alleged by the applicant in support of his claim are accurate, the Board heard the representations and argument of the parties in connection with whether such particulars would constitute a committal of “fraud”.

3. The background circumstances may be briefly outlined as follows. By decision of the Board dated June 18, 1976 the respondent trade union was granted a certificate according bargaining rights on behalf of a bargaining unit of full time academic staff and professional librarians. (see; *The Carlton University* case [1975] OLRB Rep June 500 at 519). Prior to the granting of this certificate, it was resolved in a decision dated April 4, 1975 that the Board, having regard “to the unique facts of this particular case” ought to exercise its discretion under section 7(2) of The Labour Relations Act to direct a representation vote extending to members of the proposed bargaining unit the opportunity to cast a ballot choosing the respondent as their exclusive bargaining agent. (see; *The Carlton University* case [1957] OLRB M.R. April 308 at p. 315). The representation vote was held in due course in accordance with the Board's practice and procedure and the results thereof resoundingly endorsed the respondent as the employees' exclusive bargaining agent. It is during the period that preceded the holding of this representation vote that it is alleged that the impugned activities were committed by executive members and agents of the respondent union. At no material time were objections filed attacking the legitimacy of the vote.

4. Following certification, the Board was advised that protracted negotiations ensued with a view to entering into a collective agreement. On December 11, 1975 the respondent trade union entered into a collective agreement providing for the salaries and

other terms and conditions of employment. More particularly Article 28 reads as follows:

Article 28

DUES CHECKOFF

28.1 The Employer agrees to deduct monthly dues as assessed by the Association from the salaries of all members of the bargaining unit on a continuing basis. Employees may, on the grounds of affirmatively expressed religious belief or conscience, request in writing to the Association that the sum assessed and deducted by payroll checkoff be remitted on his/her behalf to a charitable organization chosen by the employee from a list mutually agreed upon between the Employer and the Association.

28.2 Due Remittance

The amounts deducted under Article 28.1 shall be remitted monthly to the Association no later than the tenth (10th) day of each month. The Employer shall subtract any sum to be paid to charitable organizations prior to each monthly remittance to the Association. At the commencement of this Agreement, the Association shall advise the Employer in writing one month in advance of any change in the amount of regular monthly dues. The Employer shall inform the Association of the names and ranks of the employees from whose salaries deductions have been made and the amounts so deducted from every employee's salary.

28.3 The Association will indemnify and hold the Employer harmless for any and all claims which may be made against the Employer for amounts deducted under this Article.

5. Because of the prevailing Anti-Inflation Legislation, the collective agreement was submitted to the Anti-Inflation Board for approval. The Board was advised that approval was forthcoming subject to the adjustments directed by The Anti-Inflation Board's directives.

6. Pursuant to Article 28 of the agreement (hereinafter referred to as "The Rand Formula") dues were deducted from members of the bargaining unit in accordance with its terms. There is no dispute that the applicant at all material times is one of approximately 500 members of the bargaining unit in accordance with its terms. There is no dispute that the applicant at all material times is one of approximately 500 members of the bargaining unit described in the collective agreement from whom union dues were deducted. Dues deduction commenced on December 30th, 1975. At that time the applicant was on sabbatical leave residing in Evanston, Illinois. It would be an understatement to suggest that Mr. Kantowicz regarded the compulsory deduction of dues with disfavour. In any event the correspondence filed between the applicant and members of the intervener and representatives of the respondent during the intervening period show an aggressive effort on behalf of the applicant to gain exemption from the requirement to pay dues. Initially the dispute pertained to the appropriateness of the charity selected by the applicant to which the monies were to be channelled. And then the argument turned on whether the applicant in the

respondent's view exhibited the necessary "affirmative expressed religious belief or conscience" to justify exemption. There is no dispute that by the time the hearing in this matter commenced, the applicant had achieved his purpose of gaining exemption from "The Rand Formula" in that the monies otherwise directed to the respondent were channelled to the charity of his choosing.

7. Nevertheless during the intervening period under review the applicant filed a complaint dated April 6, 1976 under section 79 of The Labour Relations Act alleging that the respondent by entering into the Rand Formula had committed an unfair labour practice. More particularly, the Board subsequently informed him that the section of the act alleged to have been violated would not fall within the prohibited provisions contemplated by the unfair labour practice procedures. At that time the Board referred the applicant to section 50 of The Labour Relations Act and the relevant provisions of *The Board's Rules of Practice and Procedure*. As a result of the ensuing correspondence between the applicant and officials and representatives of this Board the applicant's objectives were drastically altered. The applicant now seeks to undermine the bargaining rights accorded the respondent by the Board's certificate by alleging the committal of a fraud during the course of the respondent's campaign.

8. The particulars filed by the applicant in support of his request for relief reads as follows:

"The respondent, the Carleton University Academic Staff Association, obtained certification as the bargaining agent for all academic staff of Carleton University by fraud and misrepresentation. In the weeks prior to the certification vote in April of 1975, the following officers of CUASA – Jill Vickers, then president; Bernard Wand, then president-elect; and John Taylor, then the history department representative of CUASA – made misleading and inaccurate statements, both publicly and privately, to members of the bargaining unit. They stated by way of reassurance to prospective members who entertained doubts about the appropriateness of union affiliation, that any member could "freely" opt out of the union and designate his dues payment to a charity of "his choice". No mention was made of Section 39 of The Labour Relations Act which requires a religious test for such exemptions. No mention was made of the fact that the choice of charities to which exempt individuals could donate their dues would be limited to an "approved list". Since CUASA was the first union of academic professionals to seek certification in Ontario, such misrepresentation was more than ordinarily grievous due to lack of precedents. Since many members of the prospective bargaining unit entertained doubts about the appropriateness of compulsory unionization for academic professionals, such assurances of "free choice" probably carried much weight in convincing members to vote for certification.

The false and misleading statements were made by Ms. Vickers and Mr. Wand in public meetings held prior to the certification vote. They were repeated in private to the applicant and to other members of the history department in their offices and in public rooms of the department of history by Professor John Taylor, the history department representative of CUASA.

9. In summary as a result of the alleged fraudulent statements made by representatives of the respondent union prior to the holding of the representation vote, the applicant complains that

- (a) it was misleading and untrue that members of the bargaining unit could "freely" opt out of the union;
- (b) The monies in the way of membership dues could otherwise be channelled to a charity without being subject to an "approved list" negotiated between the parties to the collective agreement; and
- (c) exemption would be unfettered in that no religious or conscientious test would be imposed as a condition precedent for opting out.

As a result of these deceptive representations, the applicant alleges that persons who otherwise were extended these assurances with respect to freely opting out of the union as aforesaid were lulled into voting in favour of the respondent trade union.

10. The Board does not propose to elaborate fully on the state of the law in connection with the ingredients that constitute the committal of a "fraud" for purposes of section 50 of The Labour Relations Act save to the extent of relying upon the classic statement of the Privy Council in *Derry v. Peek* (1889) 14 A.C. 337 at p. 374:

"First, in order to sustain an action of deceit, there must be proof of fraud and nothing short of that will suffice. Secondly, fraud is when it is shown that a false representation was made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but the instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must I think almost be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made."

Accordingly, it appears clear that a prerequisite of establishing a "fraud" is the necessity of demonstrating that the statements or representations relied upon were known or ought reasonably to have been known by the purveyors thereof to have been false."

11. The Legislature in introducing section 38(1)(a) into The Labour Relations Act anticipated that the parties to a bargaining relationship could as part of the negotiating process incorporate into a collective agreement provisions with respect to union security. The various types of union security provisions are shown to run the gamut of "the closed shop" to the voluntary authorization of dues check-off. There is no need to emphasize that the negotiation of "a union security provision" especially during the course of bargaining for a first agreement is often one of the most volatile of issues inhibiting the consummation of a settlement. "The Rand Formula" is a type of union security clause that represents "a

trade off” which contemplates that although a member of the bargaining unit may have serious reservations about affiliating himself with the trade union representative, he nonetheless ought not to profit by virtue of the moral and monetary support contributed by his other colleagues in the bargaining unit. That is to say, he ought not enjoy the benefits of collective bargaining without incurring some of the sacrifices. Therefore, in order to avoid being deemed “a free rider” the formula prescribes that although an employee need not be a member of a trade union an amount equal in membership dues. Accordingly it is quite clear by virtue of the legislative policy of making the negotiation of such clauses a negotiable issue the Legislature did not intend to create “a right to work” ethos that appears to be the case in many jurisdictions in the United States.

12. By virtue of the introduction of section 39 to *The Labour Relations Act* the Legislature also contemplated that notwithstanding the variety of union security provisions that may be negotiated between the employer and the trade union, there may be some very rare instances where it would be unjust to impose upon an employee as a term and condition of employment the requirement of adhering to a union security provisions inclusive of compulsory dues check-off. Therefore, the Act provides that where the Board is satisfied that an employee exhibits the necessary religious or conscientious objections to abiding by the type of union security provisions contemplated under section 38(1)(a) of *The Labour Relations Act* (inclusive of “The Rand Formula”), the employee will be allowed to contribute an amount equal to dues to a charitable organization mutually satisfactory to both the employee and the trade union. “Charitable Organization is defined as a charity that is registered under Part I of *The Income Tax Act*. It is of some importance to note that the Legislature has restricted the opportunity for exemption under section 39(2) of *The Labour Relations Act* to employees who were incumbent at the time the union security provision was introduced into the agreement and only during that agreement’s term of operation. In other words persons applying for employment at a time when a union security provision is in operation must elect to abide by the terms thereof or reject a potential job opportunity. And, of course, an incumbent employee is restricted solely to the term of the agreement for taking advantage of this opportunity for exemption.

13. It is in the context of these subsisting legislative standards with respect to permitting the negotiation of a union security clauses and the narrow circumstances provided for exemption therefrom must the Board measure the allegations of fraud arising out of the statements made by representatives of the respondent during the course of electioneering prior to the holding of the representation vote. In reaching any conclusion with respect to these allegations, the Board proposes to deal with each facet of the alleged misleading statements as set out in paragraph 9 herein.

14. Firstly, the allegation of fraud suggested by virtue of the assurance to employees that they could freely opt out of the trade union and thereby sever any affiliation from the respondent is clearly without foundation. As events subsequently unfolded the respondent and the intervener negotiated what was described as a “Rand Formula” check-off. The very basis of the formula is the compromise between an employee’s reluctance to affiliate with the trade union as a member and the trade union’s concern that such employees not be the recipient of the advantages of representation to the prejudice of members who indeed have committed themselves to supporting its efforts. Indeed, the respondent’s constitution and by-laws preclude it from negotiating a union security provision that exceeds the standards of “a Rand Formula”. Articles 6 and 7 of the Association’s by-laws (as amended by Council Wednesday, 5 March 1975) reads as follows:

“6. *No Closed Shop*: No collective agreement negotiated by the Association shall contain any closed shop clause.

7. *Rand Formula*: Any collective agreement proposed by the Association shall contain a “Rand Formula” fee clause.”

There is no question that at the material time that the alleged misleading statements were made, the reference to disaffiliation from the respondent in the sense of “freely opting out” was a true and accurate representation that would betray any allegation of an insidious intent.

15. The next cause for concern expressed by the applicant pertained to the designation of a charity to which monies would otherwise be diverted (which presupposes a continued monetary sacrifice upon those opting out of the trade union) in the event an employee qualifies for exemption from the payment of union dues. Apparently during the course of negotiations the parties in allowing for exemption from the payment of dues under The Rand Formula resolved that the monies be diverted to a charity mutually agreed upon. The applicant upon claiming exemption requested that his monies be diverted to “The History Department Bursary Fund”. Apparently the latter fund was not initially one of the charitable organizations provided for on the approved list. In other words, the allegation of fraud is made on account of the restrictions to employees contributing to a designated charity “of his choice”. At first glance the Board perceives how the applicant may have been misled with respect to the representations that contributions would be made to a charity of his own choice without being subject to a negotiated list. Nevertheless the concept of a charity, standing alone, is easily susceptible to multi-faceted interpretation. For many a charity from a particular subjective view point may not constitute the type of charity that may have been contemplated by those responsible for having made the statements. In other words, some objective criteria is often necessary in order to define what is intended by a charitable organization worthy of being the recipient of monies. The Legislature in allowing exempt membership fees to be diverted to a charity adopted the criteria established by *The Income Tax Act* with respect to the registration of tax-exempt charitable organizations. The Board perceives that the parties to the agreement negotiated “an approved list” in the same manner in order that abuse once the exemption is granted be avoided with respect to the diversion of monies. In this regard the Board notes that the charities described on “the approved list” are not the type of organizations that would encounter opposition from an objective perspective. They are listed as follows:

APPROVED LIST OF CHARITIES

(As recipients of union dues redirected under Article 28.1

Student Bursaries or Fellowships:

(a) Carleton Undergraduate Bursary Funds including: Baily Fund, La France Fund, Ruptash Fund, Zachary Fund;

(b) J. H. Reid Memorial Fellowship Fund.

Domestic Charities:

- (a) The United Way, Ottawa-Carleton;
- (b) The Salvation Army – Ottawa Branch;
- (c) The Ontario Heart Foundation – Ottawa Branch;
- (d) The Canadian Tuberculosis and Respiratory Disease Association.

Overseas Charities:

- (a) CARE;
- (b) CUSO;
- (c) OXFAM;
- (d) Unitarian Service Committee of Canada.

Indeed, even from the applicant's personal perspective, the list contemplates the type of charity to which he wished his fees to be diverted. In providing for monies to be contributed to "bursaries and fellowships" generally the Board cannot hold that "a fraud" has been committed because The History Department Bursary Fund was not specifically pinpointed. Indeed upon the applicant's insistence the Board was advised that the said fund has since been placed on "the approved list". We note that such a list cannot by its nature be exhaustive and presumably as occasion dictates "the charities" contemplated by the Carleton undergraduate Bursary Funds in good faith from time to time may be amended to include other like recipients of the largesse of dissident members of the bargaining unit.

16. Finally, the applicant alleged that a fraud was perpetrated by the misrepresentations or more accurately the non-representation that the "freely opting out of the trade union" would be subject to a test of one's religious and conscientious objection. In this respect the negotiated agreement contemplates exemption from the paying of union dues upon the assertion in writing and without any time restriction of such religious and moral scruples. In other words the test for exemption is demonstratively a much less stringent measure than that required by the Legislature in introducing into the Act the provisions relating to religious exemption. The applicant complains that the misrepresentation was committed by virtue of the failure of the purveyor of the impugned statements to refer specifically to section 39. Although the applicant in his own mind may have felt misled by the failure to specifically refer to the condition precedent of some moral scruple, the Board does not hold that the respondent thereby committed a fraud by its failure to do so. In short, "the freedom" to seek exemption implicitly must be exercised in a rational and responsible manner. Exemption is not intended to be granted with a view to enabling frivolous avoidance of the obligation of contributing monies to the union once its efforts to gain benefits for all employees constituting the bargaining unit has been achieved. In other words, the freedom to opt out is not intended to be exploited perfunctorily as an unencumbered license justifying the unilateral withdrawal of one's monetary support once a trade union has entered into a negotiated settlement containing employee benefits inclusive of a dues check-off provisions. To adopt the applicant's reasoning it is suggested that after a trade union has endured the necessary expenditures of organizing a bargaining unit of 500

employees and negotiating a collective agreement each member may thereupon capriciously opt out of contributing the monies necessary to meet these expenditures. This surely would be an absurd and impractical result that simply belies a reasonably objective interpretation of the statements made by the representatives of the respondent. In short the Board does not interpret the statements made with respect to the freedom to opt out to be without some objective criteria that requires some justification for granting an employee's request for exemption. And the respondent in adopting the religious and conscientious test has adopted a measure endorsed by the Legislature of this Province. Indeed, the standard adopted by the respondent for granting exemption is not as stringent as that required under this Act upon an applicant under section 39. In the last analysis, the Board finds nothing fraudulent or misleading by requiring that an employee in the exercise of his freedom of opting out of providing a conscientious reason for not paying union dues.

17. Accordingly, these proceedings are terminated. The parties are referred to section 46 of the *Board's Rules of Procedure*.

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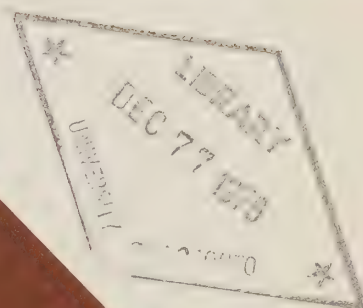
In order to improve delivery time of the Board's Decisions, the publication of the case listings will henceforth be delayed one issue.

The August listings will therefore be found in the September issue.

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Cited [1976] OLRB REP.

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- and -

1070-75-R Association of Allied Health Professionals: Ontario, (Applicant) v. Stratford General Hospital, (Respondent) v. Ontario Public Service Employees Union, (Intervener) v. Group of Employees, (Objectors).

Bargaining Unit – Appropriateness – Hospital Para-Medical employees – Whether two units, “technical” and “professional”, appropriate – Whether Board to consider appropriateness of bargaining agent – Effect of educational requirements of various occupations – Effect of creation of occupational organizations – Effect of licensing, registration and certification statutes – Effect of one group having direct patient contact.

BEFORE: George W. Adams, Vice-Chairman, and Board Members O. Hodges and J. E. C. Robinson, Q.C.

APPEARANCES AT THE HEARING: *Chris G. Paliare and Paula Knopf for the applicant; E. L. Stringer, Q.C., R. Cameron and T. Hogan for the respondent; Michael Gordon, Elsie Duval and Margaret Fielding for the intervener; no one appearing for the objectors.*

DECISION OF THE BOARD: September 28, 1976

4. OPSEU seeks to represent a bargaining unit of employees described as “all paramedical personnel of the respondent at Stratford who are not covered by subsisting collective agreements save and except chief technologist, those above such rank, chief admitting officer, dietitian, chefs, director of medical records, students employed during school vacation period, physicians, and persons regularly employed for not more than twenty-four hours per week”.

By way of clarity, the applicant defines paramedical personnel to include occupational therapists, registered technologists (pathology), non-registered technologists, pharmacists, physiotherapists, registered technologists, radiological technologists – radiography, radiological technologists – nuclear medicine, respiratory technologists – registered, social workers, psychometrists, psychologists, charge technologists, clinical instructor – radiology. However it should be noted that OPSEU wishes to include the dietitians in this definition if section 1(3)(b) permits.

5. On the other hand, the Association of Allied Health Professionals (AAHP) seeks to represent a less comprehensive bargaining unit of employees comprised of “all physiotherapists, occupational therapists, social workers, psychologists, and psychometrists, pharmacists, medical records librarians, therapeutic and administrative non-supervisory dietitians in the employ of the respondent at Stratford, Ontario, save and except department heads and persons above that rank.

6. The respondent disputes the appropriateness of the unit proposed by AAHP and suggests a bargaining unit that parallels that proposed by OPSEU, save for the exclusion of

persons the respondent believes exercise managerial functions. It has described this unit as "all technical employees of the respondent at Stratford who are not covered by subsisting collective agreements, save and except : supervisors and those above the rank of supervisor, employees who exercise managerial functions or who are employed in a confidential capacity with respect to labour relations, Chief Admitting Officer, Dietitians, Chefs, Director of Medical Records, Assistant Director of Medical Records, Charge Technologists, Assistant Director of Medical Records, Charge Technologists, Assistant Head Technologist, Clinical Instructor – Radiology, students, physicians, and persons regularly employed for not more than twenty-four hours per week." The respondent characterizes this as a "tag-end" unit comprised of Occupational Therapists, Registered Technologists (Pathology), Registered Technologists (Radiology), Radiological Technologists – Radiography, Radiological Technologists – Nuclear Medicine, Respiratory Technologists – Registered, Social Workers, Psychometrists, and Psychologists.

7. At the hearing, the Board was advised the respondent sought to exclude Ruth Godwin who is employed as a pharmacist, the charge technologists, and the (therapeutic) dietitians on the basis of section 1(3)(b) of the Act. Each of these exclusions is resisted by one or both of the applicants. It was agreed that the positions of chef and director of medical records should be excluded from the bargaining unit but both applicants dispute the exclusion of the assistant director of medical records. OPSEU alone disputes the exclusion of the assistant director of dietitians, and the assistant head technologist. A labour relations officer has been appointed to inquire into these matters of exclusion and report back to the Board. However, the fact-finding pertaining to the issuance of appropriateness was retained by the Board and the numerous days of hearings were devoted to the presentation of evidence before the Board. We adopted this rather unusual procedure because of the apparent significance of the dispute. While service, office, operating engineers, and nursing bargaining units have been recognized as appropriate for certification by the Ontario Labour Relations Board, the Board has not yet established any definitive policy with respect to those employees said to be employed in a paramedical capacity – occupations, aside from nursing, organized around the work of healing. Indeed, this is the first case that has come before the Board where all or nearly all of the necessary interests to such a determination are present. Therefore, stated concisely, the issue before the Board in this case is the appropriateness of one or two paramedical bargaining units for the purposes of collective bargaining in the public hospital sector.

In making this determination, AAHP asks the Board to find and recognize a broad distinction between paramedical employees employed in a "professional" capacity and those employed in a "technical" capacity. It argues that criteria such as the quality and extent of education, the existence and control of "professional" organizations, the existence and quality of "direct" patient care, and the degree of employee discretion in performing work permit the Board to recognize both a paramedical professional bargaining unit and a paramedical technical unit. The professional unit would be comprised of pharmacists, physiotherapists, occupational therapists, therapeutic and administrative non-supervisory dietitians, and medical records librarians, whereas the technical bargaining unit would contain registered technologists (pathology), non-registered technologists (radiology), radiological (nuclear medicine), and registered respiratory technologists.

In contrast, both OPSEU and the respondent dispute the appropriateness of two bargaining units and argue that the distinction recommended by AAHP is too narrow and

too imprecise. They therefore propose a comprehensive bargaining unit comprised of all paramedical occupations, although the respondent prefers to characterize it as a "tag-end" bargaining unit.

8. The recent report of the Hospital Inquiry Commission (November, 1974) which contains recommendations with respect to the structure of bargaining in the public health sector figured prominently in the representations of the parties, and before studying the evidence we wish to say a few words with respect to the relevance of the report. At page 41 of the report it is recommended that public hospital employees should be grouped into three categories for the purpose of bargaining – service; nursing; paramedical – and that future certification of bargaining units should recognize only these categories. In elaborating on the recommendation the Commission went on to write the following:

"The recommendation that there be three employee categories is designed to limit the amount of fragmentation that might accompany an increase in organizing activity in the paramedical field. While recognizing that each paramedical profession has its own identity, we consider that, for bargaining purposes, a legitimate community of interest exists across the whole of the paramedical group. Within this category there are two possible sub-categories. These are:

- (a) Pharmacists, dietitians, physiotherapists, occupational therapists, psychologists and social workers. These groups are directly concerned with the mental and physical rehabilitation of patients.
- (b) Medical laboratory technicians, x-ray technicians, EEG technicians, registered records librarians while performing distinct functions have technical qualifications.

In British Columbia groups (a) and (b) have been combined into a single unit for certification purposes. However, in Saskatchewan and New Brunswick they are considered separate groups. Our view is that the OLRB should not certify these groups separately. We believe the job evaluation programme described earlier will work out the appropriate internal relationships between and among these occupational categories so that internal rivalries should be minimized. Furthermore, these groups share the common experience of a professional special education and, by and large, recognize the hospital as a primary if not paramount employer. Finally, we believe that a proliferation of unions is not advisable in the hospital field and organizing and negotiation resources which are scarce enough at present should not be spread over multi-jurisdictional boundaries. Hence we prefer the British Columbia model for paramedical employees who wish union representation. The respondent states that, in light of the Commission's report and recognizing the Board's well known aversion to the fragmentation of an employer's work force, AAHP bears an onus to establish the appropriateness of two bargaining units and that on the evidence this onus has not been met.

In response, counsel to AAHP argues that the Commission failed to provide a sufficient justification in evidence for its preference but even with this failure the Commis-

sion explicitly recognized that two bargaining units along the lines proposed by AAHP were viable. Thus counsel submitted that the Commission's report supported its submission that two units are appropriate and the Board is on record as holding that it need not confine an applicant to the most appropriate bargaining unit.

We have reviewed the report and these submissions carefully and conclude that the report can be given very little weight in our determination. The report embraces a wide range of recommendations and most of them are interrelated. Thus it would be unwise for this Board to seize on one when it has no or little power in effecting the others. Secondly, we feel that the parties' use of the report tends to neutralize its significance. Thirdly, the question before us requires a thorough examination of the evidence placed before us. The report is too general a tool to assist in the determination of bargaining unit appropriateness. We therefore proceed to a detailed review of the evidence.

9. Stratford General Hospital is a public hospital organized, for our purposes, on the basis of 11 different departments. Each department has a director who reports to the executive director of the hospital, Mr. R. J. Cameron. In an attempt to simplify the factual context in which this determination must be made, we will outline evidence with respect to each department.

Laboratories

The role of this department is the analysis of body fluids and tissues in aid of the diagnostic function of physicians who work at or use the hospital. The laboratory is headed by a full-time pathologist (a medical doctor), Dr. George Horner, who is aided by both a chief technologist and an assistant chief technologist. The laboratory can be broadly subdivided into four specialized work sections reflecting four specialties in hospital laboratory science – bacteriology, biochemistry, blood bank, and haematology. And each division is said to be headed by a charge technologist. Through testing procedures the bacteriology section investigates the presence, character and effects of living organisms within the human body. The biochemistry section investigates for pathologies in the biochemistry of the human body. Specimens of blood, urine and other body substances are obtained from patients and chemical analysis performed on them. The blood bank section determines the exact blood type of a sample taken from a patient. This blood is then cross-matched with that from blood donors to determine compatibility as a preliminary procedure to any transfusions that may subsequently be carried out. In the haematology section, microscopic studies of blood are carried out in order to count and identify the kinds of cells which it contains. Blood samples are taken from the patient and centrifuged to separate the different constituents. Fluctuations in the count of cells are diagnostic evidence of the existence of infections and diseases such as leukemia and anaemia. Cytology and histology are other activities which are also engaged in. Cytology is the study of tumors and other body materials for the presence or absence of malignant cells. Smears and tissue sections are examined microscopically and constituent cells identified. Histology is the study of pathologies in body tissue. Specimens of tissue are obtained from the patient, frozen so they can be sliced into microscopic sections, mounted on plates, and examined under a microscope.

The persons employed in the laboratories to perform the work in these various sections are referred to as either technicians or technologists. The job description of the registered technologist occupation at Stratford General Hospital reads:

Registered Technologist

Summary: Technologist trained and qualified at the R.T. General level of Certification: able and competent to perform investigations in other sections of the Department of Pathology for Call Back purposes.

Qualification: A medical technologist at the R.T. level of the Canadian Society of Laboratory Technologists
or

A graduate of an approved C.S.L.T./C.M.A. training programme, who is employed but awaiting results of C.S.L.T. certification examination
or

A technologist with an equivalent level of qualification and/or experience.

Reports To: Charge Technologist.

Technical Duties: Depending on the assignment will include collection of blood and other biological samples using aseptic techniques; inoculation of specimens for bacteriological investigations; performance of basic chemical and microscopic analysis of urines, routine haematological and biochemical procedures; typing and preparation of blood for transfusion purposes, accurate recording of test results; operating of expensive laboratory instruments; preparation of tissue specimens – cutting and staining. They assist in providing emergency call system. Works under supervision and shows ability to accept some responsibilities. Performs other related duties as assigned.

Mr. Hughes, chief technologist at the hospital, testified that the course of study necessary to become a registered technologist requires senior matriculation including the subjects of mathematics and two sciences of which one must be chemistry; 12 months of didactic training which 4 years ago was transferred from individual hospitals to the Ministry of Colleges and Universities and is now conducted by the Colleges of Applied Arts and Technology; followed by 12 months of internship or practical training at a hospital approved for such training by the Canadian Society of Laboratory Technologists (C.S.L.T.) and the Canadian Medical Association. It would also appear that the C.S.L.T. administers a set of examinations to persons who have graduated from such a two year program or its equivalent and that on passing these examinations the C.S.L.T. bestows the title "registered technologist". Mr. Hughes is a member of the C.S.L.T. and testified that the Society has been set up under a federal charter. It therefore has no mandatory licensing or certification function in law although the hiring practices of most if not all public hospitals are tied to eligibility for membership in the Society, which in turn depends upon the completion of the above described course of study. The C.S.L.T. has a code of ethics to which its members subscribe. We think it useful to reproduce the code of ethics for each occupation we must review, and in this instance the code reads:

INTRODUCTION

Medical technology is a branch of medical science. The medical technologist, appreciative of the valuable work done by his colleagues in the medical and paramedical sciences, cooperates fully with them. The following Code of Ethics is the outgrowth of a desire to maintain the dignity and the high esteem of the profession of medical technology.

1. Medical technologists are dedicated to the service of humanity. They work in cooperation with all other members of the health team.
2. The motto "usui sum semper" shall remain paramount in the life of medical technologists.
3. Medical technologists shall uphold their scientific status on a suitably professional level by a distinctive demeanor in their dress and general conduct.
4. Medical technologists shall diligently apply their skill to maintain a reputation of honesty and reliability.
5. Medical technologists shall consider all medical information confidential.
6. Medical technologists shall be aware that the diagnosis of disease is the responsibility of the physician.
7. Medical technologists shall uphold and maintain the dignity and respect of their profession, considering reliability, courtesy; patience, tact, efficiency and personal integrity as fundamental attributes.
8. Medical technologists shall be loyal to their colleagues and shall recognize an obligation to support their professional organization by interest and active participation.
9. Medical technologists shall strive to improve their skill and knowledge and maintain an open mind to scientific advancement.
10. The medical technologist shall maintain a high professional level of teaching the method and theory of medical technology at all times.

Also filed with the Board was a document entitled "Syllabus of Studies for General Certificate" which contained the course outline for both the academic and clinical phases of training prior to certification as a General Registered Technologist of the Canadian Society of Laboratory Technologists. This is a very thick and full document divided into sections reflecting the division of scientific laboratory activities described above and was filed to demonstrate the academic and practical rigour of a technologist's training.

Hughes testified that technologists perform standardized tests; do not diagnose or recommend a course of treatment; and are told what tests to perform by a charge technologist. In effect, the pathologist or other physicians interpret the results of the test and thus a good deal of the testing conducted by technologists is specialized and routine. To a large degree technologists do not have contact with other paramedical employees. As well, their direct contact with patients is not extensive although Mr. Hughes testified that technologists col-

lect blood samples; inject isotopes on direction; and administer a number of tests that require the presence of a patient. There is some contact with doctors, particularly during the night shift when the pathologist and chief technologists are not working. And of course there is extensive contact with the pathologist. The laboratory is operated on a twenty-four hour basis and technologists are required to stand on call. The doctors who testified that any consultation from the viewpoint of advice was minimal or non-existent. Contacts were in the nature of communicating information. However, Hughes testified that whether this was the case or not, there are instances of very close working relationships with doctors and he gave the example of a diabetic patient in coma.

We should also note that there is an Ontario Society of Medical Technicians. It was founded in 1963 and conducts continuing education programmes. It has a full-time director of continuing education and holds seminars at which many physicians attend.

OPSEU adduced reply evidence which established that technologists were not confined to one test and might, at their discretion, conduct a number of tests in order to delineate a possible problem. But be this as it is, the evidence suggests more extensive supervision, direction, and subordination than typically found in many of the other departments we will describe.

On the other hand, Dr. M. J. Inwood, Assistant Professor of Medicine at the University of Toronto, with an appointment to St. Joseph's Hospital and Director of the Department of Blood Transfusion at that hospital, testified that the technologist occupation was in a state of evolution. Moreover, with the virtual explosion of scientific medical knowledge he was of the opinion more responsibility would have to fall on the shoulders of the medical technologist. He defined a paramedical occupation to include the work of all those persons who work adjacent to the physician and are linked to the patient or sample emanating from the patient. He noted that initially the pathologist performed all laboratory activities but with the scientific revolution in medical science and the growing importance of health care in society, the pathologist came to need assistance. At first this assistance was little more than an additional set of hands, but he said today the pathologist requires the technologists to exercise judgment and possess sophisticated knowledge. He observed that in the United States technologists are trained at the university level. He testified that while a technologist could always await the decision of a doctor, the laboratory had to get on with the tasks at hand and time saved in the laboratory could be life saving. This reality, he said, had an inevitable impact on the degree of judgment technologists exercised in their work. In his opinion, hands were of little value without knowledge and judgment.

X-Ray Department

The X-Ray Department's activities centre around taking x-ray pictures of bony structures or of soft tissues after the injection of opaque substances. These pictures are taken by registered technologists (radiography) under the supervision of the chief radiologist (a doctor) and a chief technologist. As well, Stratford employs a registered technologist (nuclear medicine) whose job function includes the injection of radio-active materials into the body. These materials, based on their composition, concentrate in the particular areas of the body the technologist wishes to photograph by way of a gamma camera. This is done under the supervision of the radiologist. The chief technologist organizes and assigns the work to the technologists. The job description of the two kinds of technologists read:

Job Description: REGISTERED TECHNOLOGIST (NUCLEAR MEDICINE)

Responsible TO: Director of Radiology Radiologists Chief Radiological Technologist Responsible User – Radionuclides

Qualifications: Must hold valid professional registrations – C.S.R.T., O.S.R.T., and B.R.T. of Ontario, in Nuclear Medicine.

Significant Duties: Daily elution of generator and calibration of product. Making of radiopharmaceuticals. Calculating, drawing and injecting doses. Routine and specialized nuclear medicine procedures. Care and quality control of all nuclear medicine equipment. Disposal of decayed materials. Booking procedures. Filing of invoices, purchases and repairs. Monthly reports. Performs other related duties as required.

Job Description: REGISTERED TECHNOLOGIST (RADIOGRAPHY)

Responsible To: Director of Radiology Radiologists Chief Radiological Technologist

Qualifications: Must hold valid professional registrations – C.S.R.T., O.S.R.T., and B.R.T. of Ontario.

Significant Duties: Routine diagnostic, specialized and operating room procedures. Dark room duties. Care of x-ray equipment and film processors. Assist in supervision of x-ray students. Performs other related duties as required.

Note: Patients requiring Radiological Services are referred to the Radiological Department through a medical doctor with his/her knowledge.

Stanley Picton, the Chief Radiological Technologist at Stratford General Hospital described the qualifications of an x-ray technologist. He indicated that following the completion of grade 12 or 13 a person must successfully complete two years of training in a hospital during which the person must also attend didactic lectures at a community college. The course must be based on the syllabus prepared by the Canadian Society of Radiological Technicians. On completion of the course a person is then eligible to write the examinations set by the Board of Radiological Technicians under *The Radiological Technicians Act*, R.S.O. 1970, C399. If these examinations are passed the graduate is then registered under this Act and entitled to use the title "Registered Radiological Technician" and the abbreviation "R.R.T.". This legislation provides for certification rather than licensing in the sense that if any other person used either of these terms or any other expression implying registration under the Act, he is guilty of an offence punishable by fine and on a later offence, imprisonment. However, one does not have to be registered to perform x-ray work although hospital hiring conditions are generally tied into registration under the Act. The Act defines a radiological technician as "a person who practises the technical aspects of the medical use of ionizing radiation, including Roentgen or x-rays, radium, radio-active isotopes and particles for diagnosis or treatment." The Board of Radiological Technicians is composed of both members of the Ontario Society of Radiological Technologists and the Ontario Medical Association. The powers of the Board include the power to suspend or revoke registrations for "unprofessional conduct" (see section 10 - emphasis added). The Ontario Society of Radiologists has a code of ethics to which members subscribe. It reads:

"I, the under signed, agree that in the event of my election to membership of the Ontario Society of Radiological Technologists, I will be governed by the Rules and Regulations and By-laws of the Society as they now are, or as they may hereafter be altered; and that I will advance the objects of the Society as far as shall be in my power, provided that whenever I shall signify in writing to the Secretary that I am desirous of withdrawing from the Society, I shall after the payment of any arrears which may be due by me at that period, be free from this obligation.

I promise loyalty to my superiors and promise to assist them in every way within my power, having regard always for the good of the patient. The following Pledge shall ever remind me of my obligation and shall be a Code of Ethics which I shall strive to maintain at all times and under all conditions even beyond my professional services.

I solemnly promise

TO CARRY OUT THE DUTIES ASSIGNED TO ME FAITHFULLY
AND TO THE BEST OF MY ABILITY;

TO KEEP THE PATIENTS' WELFARE AS MY FIRST CONSIDERA-
TION;

TO HOLD IN CONFIDENCE ALL PERSONAL INFORMATION CON-
CERNING EACH PATIENT COMING TO MY KNOWLEDGE;

TO PROMOTE THE ART AND SCIENCE OF MY PROFESSION;

TO DO ALL IN MY POWER TO UPHOLD AND IMPROVE ITS HIGH-
EST TRADITIONS."

The radiological technologist is in close contact with the patient in order to take the x-rays so vital to diagnosis by the physician. Mr. Picton testified that most radiographic procedures are performed by the technologist without direction. These procedures include the actual taking of the radiograph and the processing of it for visible image. Picton emphasized that the technologist must know an immense amount about the positions of the skelton and physiology. He also stressed the dangers associated with an over-exposure to radiation. The technologist is responsible for the extent to which a patient is exposed and regulates this aspect of the process through filters and short exposures. He stated that judgment and discretion was exercised in this area of the technologist's work. The Board had described to it a number of new procedures that have been introduced into the job function of the occupation over the last ten years including angiography, arteriography, venography, orthography and mylegraphy. Angiography involves the radiographic examination of deep blood vessels. The procedure is carried out in a special room under antiseptic conditions. A catheter is introduced into a deep artery to convey an opaque media to an abdominal site. This media or dye is introduced by the radiologist with the technologist assisting. Picton testified that the only radiological technologist who introduces a foreign substance into a patient's body is the nuclear medicine technologist. This technologist introduces radioactive isotopes intravenously as described above. However, an exception to this exclusive function is the introduction of a barium enema into a patient by a catheter into the rectum which other technologists engage in. In both this case and the introduction of a radioactive isotope by the nuclear medicine technologist, the radiologist and pathologist are working as a team.

Picton stated that some limited consultation between other physicians and technologists occurs with respect to the available views and the positioning of a patient if the doctor is present. There would appear to be little if any contact with the other paramedical occupations, save possibly for contact with the respiratory technologist and pharmacist.

The evidence of Betty May Mortley, an x-ray technologist employed by Stratford General Hospital, suggests that much if not most of the work involves routine views performed on the request of a referring physician. However, a request will order an area to be examined and the technologist will have to obtain a verbal clinical diagnosis from the patient to appreciate the nature of the injury or problem. Mrs. Mortley described operating room work required of technologists during orthopaedic surgery and in this activity the doctor and technologist are working as a team. But the x-ray technologist does not interpret the film produced. This is the responsibility of the radiologist or physician.

Virdele Polson is the nuclear medicine technologist employed by the respondent and she described her responsibilities to the Board. The work of a radioisotope unit is a specialized form of diagnostic radiography; it employs radioactive materials in both diagnosis and treatment. She is also qualified to give radioactive therapy. A frequent treatment is thyroid bombardment. She prepares radioactive isotopes in accord with standard instructions from the manufacturer, and over a period of time, working closely with the radiologist, efficient scanning procedures have been developed by her. She testified that she always obtains clinical information about the patient before proceeding, in that such information can affect her approach. For example, a pregnant woman should not be scanned and repeat scans require a less dose of radiation each time. There is a great deal of contact and consultation between her and the radiologist, Dr. Isaacs. And as yet there would appear to be no formal procedures of control or supervision. She works fairly autonomously. However, the product of her work is always subject to the radiologist's scrutiny. She is trained to select and calculate the right content of the material mixed with the radioactive isotope to get it to lodge in the liver or any other area under investigation. A Ministry of Health licence is required to permit her to mix isotopes.

Pharmacy

This is a small department concerned with dispensing drugs to nursing units for patient use. It is managed by a director and one pharmacist. In 1974, following the publication of the Report of the Committee on The Healing Arts in 1970, legislative provisions relating to the governing bodies of persons practising a number of health disciplines were consolidated in the *Health Disciplines Act*, 1974, S.O. 1974, C.47 The Act applies to the fields of dentistry, medicine, nursing, optometry, as well as pharmacy. The Council of the Ontario College of Pharmacists is empowered to make regulations with respect to the class of and the qualifications for licences, standards of practice, professional advertising, professional misconduct, and the use of titles or other professional designations. The Act provides that no person shall hold himself out as a pharmacist unless he is licensed under the Act. A discipline committee is established to investigate complaints from the public of professional misconduct or incompetence. The committee may revoke, suspend or impose restrictions on a licence. A complaints committee is also set up to investigate complaints. However, it is essential to note that the Act does not apply to "drugs compounded, dispensed, or supplied in and by a hospital or health or custodial institution approved or licensed under any general or special Act under the authority of a prescriber for persons under health care provided by such hos-

pital or health or custodial institution. A prescriber is a person authorized to give a prescription within the scope of his practice in profession. The regulation of pharmacy activity dates as far back as 1795 and has been elaborately detailed by Elizabeth MacNab (See MacNab, *A Legal History of Health Professions in Ontario, A Study For the Committee On The Healing Arts*, 1970, C.4).

Mr. Clarke testified that he had attended the School of Pharmacy at the University of Toronto for four years and subsequent to that, completed a twelve month internship. He then wrote an examination set by the Examining Board of Canada. It would also appear that a jurisprudence examination is set by The Ontario Board of the College of Pharmacy. Pharmacists subscribe to a code of ethics which reads:

Preamble

These principles of professional conduct for pharmacists are established to guide the pharmacist in his relationship with patients, fellow practitioners, other health professionals and the public.

Section 1

A pharmacist should hold the health and safety of patients to be of first consideration; he should render to each patient the full measure of his ability as an essential health practitioner.

Section 2

A pharmacist should never knowingly condone the dispensing, promoting or distributing of drugs or medical devices, or assist therein, which are not of good quality, which do not meet standards required by law or which lack therapeutic value for the patient.

Section 3

A pharmacist should always strive to perfect and enlarge his professional knowledge. He should utilize and make available this knowledge as may be required in accordance with his best professional judgment.

Section 4

A pharmacist has the duty to observe the law, to uphold the dignity and honor of the profession, and to accept its ethical principles. He should not engage in any activity that will bring discredit to the profession and should expose, without fear or favour, illegal or unethical conduct in the profession.

Section 5

A pharmacist should seek at all times only fair and reasonable remuneration for his services. He should never agree to, or participate in transactions with practitioners of other health professions or any other person under which fees are divided or which may cause financial or other exploitation in connection with the rendering of his professional services.

Section 6

A pharmacist should respect the confidential and personal nature of his professional records; except where the best interest of the patient requires or the law demands, he should not disclose such information to anyone without proper patient authorization.

Section 7

A pharmacist should not agree to practice under terms or conditions which tend to interfere with or impair the proper exercise of his professional judgment and skill, which tend to cause a deterioration of the quality of his service or which require him to consent to unethical conduct.

Section 8

A pharmacist should not solicit professional practice by means of advertising or by methods inconsistent with his opportunity to advance his professional reputation through service to patients and to society.

Section 9

A pharmacist should associate with organizations having for their objective the betterment of the profession of pharmacy; he should contribute of his time and funds to carry on the work of these organizations.

Clarke testified that a pharmacist does not diagnose a patient's illness nor does he decide on a course of treatment. He merely prepares compounds and dispenses drugs requested by doctors and nurses in accord with the *Food and Drug Act* and the *Narcotic Control Act*. A hospital pharmacist also sits on hospital committees and provides up to date advice and information on medications and their uses. The pharmacist reviews the total medication given to the patient to insure that it is proper. Clarke said that a nurse can dispense drugs in a hospital pharmacy in his absence save for restricted drugs like narcotics or barbiturates which must be kept under lock and key. Clarke indicated that the medication taken by a patient might interact with food, or adversely affect the patient's speech or muscles and these reactions might result in contact with the physiotherapists, speech pathologist or dietitians although this contact had not happened in his experience. As well, such medication can affect the tests conducted by laboratory technologists resulting in the same possibilities for interaction. In fact, Clarke testified to a close liaison with the laboratory. Because of the availability of manufactured drugs and compounds the pharmacist's role is less concerned with the preparation of medication and centres on the monitoring and custody of medication, and there is a great deal of interaction between pharmacists and both doctors and nurses in this regard. Doctors' orders are required for anything ingested orally.

The job description of the pharmacist position at Stratford General Hospital reads:

Position: PHARMACIST

Qualifications: Must be a graduate of an accredited School of Pharmacy, four years of college leading to a Bachelor of Science degree in Pharmacy or equivalent.

Experience in Hospital Pharmacy, and Ontario registration preferable.

Work Performed: Functions as a pharmacist, except in the absence of the Director of Pharmacy, then functions as Director of Pharmacy. This is done on a weekly basis of four days one week and 3 days the following week.

Performance Requirements:

- A. Responsibility – For accuracy in interpreting and filling doctors' orders for drugs, for supervision of non-professional personnel; for responsibility of specific duties assigned.
- B. Skill – The ability to apply knowledge of pharmacy and pharmacology in interpreting and filling doctors' orders; the ability to instruct and direct non-professional help in their tasks.
- C. Dexterity – Should have considerable finger dexterity and eye-hand coordination.
- D. Mental Application – Should have memory for details; alertness to detect errors in prescriptions, initiatives and judgment in solving mathematical and pharmaceutical problems; and in furnishing information to physicians, nurses and students.
- E. Ability to use typewriter.

Duties And Responsibilities:

1. Monitor all posting onto patient profiles in order that accuracy, drug allergies, drug-drug interactions, rational drug therapy, and drug incompatibilities may be realized and better patient care achieved.
2. Prepare IV admixtures and extemporaneous parenteral products under aseptic conditions for patients.
3. Responsible for effectively recommending the hiring and/or discharge of employees, also responsible for disciplining employees and ensuring they carry out the duties of their positions within the department.
4. Assist in scheduling and allocating hours of work, duties and days off.
5. Maintain responsibility for Narcotics and Controlled drugs and Drug information.
6. Interview pharmaceutical sales representatives when necessary.
7. Insure that the drugs are stored and handled properly in the dispensing area.

8. Make sure that technicians follow personnel policies and rules, and that the technician keeps the dispensing area neat.
9. Other activities and duties as may be assigned by the Director of Pharmacy.
10. Inspect all pharmaceutical supplies on all the nursing units, monthly, and report any error to the Director of Nursing.

Physical Demands: Stands a great part of the day. Handles and manipulates drug and pharmaceutical equipment; walks, stoops, reaches for, lifts light weight articles.

Dr. William M. McLean, President of the Canadian Society of Hospital Pharmacists, Ontario Branch, testified on behalf of AAHP. And in an earlier decision of this panel the Board agreed to accept an amicus brief from that pharmacist organization. Doctor McLean expressed the view that pharmacists had a greater affinity to the occupations embraced by the bargaining unit sought by AAHP. He reviewed the history behind his discipline and candidly admitted that a certain "snobbishness" was at the base of the expressed preference to be let alone or to be put in a smaller bargaining unit than that sought by OPSEU. He testified that his society was concerned that collective bargaining might cause health care work to suffer. He went on to say that employees may be required to withhold services or that overtime would be withdrawn if the employer refused to pay a separate charge for it. He said that the health care professional was committed and this possible action would conflict with such commitment. However, he admitted that he had never examined a collective agreement negotiated by either the AAHP or OPSEU with respect to these characteristics, and he further admitted that he knew that OPSEU has represented pharmacists and to his knowledge there had been no complaints that they were required to breach the code of ethics.

The brief of Canadian Society of Hospital Pharmacists argues first for the exclusion of pharmacists from any unit and alternatively requests that pharmacists be included in a bargaining unit containing "the professional or semi-professional groups sought to be represented by the Association of Allied Health Professionals." It grounds its first submission on the fact that it is the only discipline affected by this determination which, in law, is truly self-governing and the only discipline represented on the Pharmacy and Therapeutical Committee of the hospital – a committee which selects and approves the drugs supplied for use within the hospital and develops policies relating to the safe and effective use of drugs in the hospital. Its second submission is analagous to that of AAHP and based upon differences in education, independent judgment, and involvement in the "curative" process. As well, the Board's attention was directed to the ascendance of "clinical" pharmacy and drug therapy. Clinical pharmacy involves direct pharmacist and patient consultation concerning proper and efficacious drug use, tailored to the individual patient's needs.

Physiotherapy

This department is headed by a director and concerned with the restoration of functions of the muscles and limbs of patients who are on the mend after an accident or operation. This is done through exercise of joints and muscles, hydrotherapy, and electrotherapy. The job description of the physiotherapist position reads:

Job Specification:

A physiotherapist is required to have a high school education of five years or its equivalent and a university education in the theory and practice of physiotherapy, to meet the standards required by the Canadian Physiotherapy Association and Provincial licensing bodies. A physiotherapist must be a member of the Canadian Physiotherapy Association and licensed to practise in Ontario.

Position Objective:

To perform all of the professional duties required of a staff physiotherapist within the department and within the hospital; to be directly responsible to the Director of Physiotherapy or his Assistant, for all aspects of the function of physiotherapy in the assigned area.

Job Responsibilities:

Upon receipt of a duly completed referral from a physician or surgeon, the physiotherapist will evaluate the patient, record all relevant details and plan appropriate treatment program. This evaluation will include performing and interpreting tests to assist in arriving at a differential diagnosis and to determine the degree of involvement of the various relevant aspects such as:

- muscle strength and endurance
- motor, sensory and perceptual functions
- functional capacity
- respiratory efficiency, etc.

This will emphasize the responsibility of the physiotherapist to work closely with the physician, as a clinician as well as a consultant.

Any problems related to patient management will be discussed directly with the physician concerned and with the Director. The physiotherapist will be legally responsible for all his/her actions concerned with all the patients assigned to him/her. Progress records, treatment records and statistical data must be kept in the appropriate places.

The physiotherapist will learn all departmental and hospital policies and procedures.

The physiotherapist will learn the care and maintenance of equipment; assist the clinical training of physiotherapy students; learn to give lecture/demonstration as part of the in-service program; will be continually alert to new techniques and maintain the interest to update his/her clinical knowledge.

Perform other related duties as required.

Physiotherapists are required by the *Drugless Practitioners Act*, R.S.O. 1970, C. 37 to be registered and a penalty is provided for persons who practise while not registered. A Board of Directors is established and empowered to make regulations. Admission standards have

been set, based primarily on educational qualifications and membership in the Canadian Physiotherapist Association (C.P.A.) – the latter requirement merely reinforcing the former. It would therefore appear that physiotherapists are graduates of three or four year university programmes in physiotherapy provided they have completed at least 1200 hours of clinical practice during the course of training and interning. (See C.P.A. Standing Rules). It would appear that graduates are now granted a university degree in contrast to a diploma which initially and until quite recently had been the case.

Members of the C.P.A. subscribe to a code of ethics which reads:

“The member shall uphold the interest, honour and integrity of the profession, shall strive continually to improve his knowledge and professional skills and shall practise in such a manner so as to discharge his responsibilities to the patient, the profession and other members of the health team.”

Donna L. Walker is employed by Stratford General Hospital as a physiotherapist. She testified that physiotherapists work in the outpatients section of the hospital, the rehabilitation and extended care unit, and the medical and surgical section on a rotating basis. In the first area mentioned the physiotherapist works with doctors; in the second area with nurses, social workers, speech therapists, psychologists and occupational therapists; and in the third with doctors and respiratory technologists. She stated that aside from the respiratory technologist, the physiotherapist has no contact with any other technician. However, she described situations where physiotherapists work very closely with respiratory technologists.

Patients are referred to a therapist for treatment with very few directions other than a diagnosis. The physiotherapist will therefore interview the patient with respect to the problem and develop a treatment program. In these activities the physiotherapist makes use of x-rays and laboratory reports.

In orthopaedics, the physiotherapist would appear to work very closely with doctors, going on rounds once a week.

Mrs. Walker considered herself, as well as social workers, psychologists, speech therapists, occupational therapists, doctors and nurses, to be members of the so-called “health team.” She felt she was responsible to the patient.

She indicated that therapists had no contact with technicians and share no interest with them. On examination in chief she could not see how two such separate groups would work “under one union” although on cross examination she said she thought AAHP could represent both groups. She also said that she thought technologists were more interested in definite hours and working conditions. On the other hand, “health care professionals” were trying to have less strict hours, no deadlines, and more communication amongst themselves. However, she had not investigated these beliefs to ascertain whether they were true or not.

On cross examination she stated that the work of a respiratory technologist and a physiotherapist might overlap although she believed it was “against the law” for a respiratory technologist to engage in “chest therapy.”

Dr. Stuart R. McNeil also testified before the Board as did Dr. S. F. Hall. Dr. McNeil is an orthopaedic surgeon and has an appointment at Stratford General Hospital. He said that all members of the staff concerned with patient care were members of the health care team but he went on to say not all members of the team were involved in treatment – the laying of hands on the patient. His testimony went on to suggest that those engaged in treatment were professionals. They were not supervised as closely as technicians and their job functions require initiative. He stated that, in contrast, technicians perform certain routine things and do not lay hands on the patient with the exception of the respiratory technologist. He thought that if the physiotherapists were channelled into a large bargaining unit there was a danger that they would lose their professional initiative and independence.

On cross examination he told the Board that he placed great reliance upon x-rays and laboratory reports in his work although he said he would never ask a technician for an interpretation. He said he was in contact with the nuclear medicine technologist and relied on her word. In defining the treatment group he included the respiratory technologist and excluded the pharmacist, and medical records librarian; and was unsure of the dietitian's designation. As well, he appeared to think that there was a danger that this Board would put the physiotherapist into a large heterogeneous group of employees that would include floor cleaners and a group that might engage in strike activity. He was therefore unaware of the provisions of the *Hospital Disputes Arbitration Act*, and had never examined collective agreement provisions to determine whether they would interfere with an employee's independence. He concluded that if physiotherapists were to be included in any unit he would prefer a "nurses' or teachers' type of unit". However, Mr. Stringer reminded him that teachers engage in strike activity, and Toronto nurses had threatened an unlawful strike in recent years.

Dr. Hall has a general medical practice in Stratford and is associated with the hospital. He has been practising medicine for 20 months. He stated that he used the services of the hospital frequently and contrasted the report he receives from the laboratory or x-ray department to the opinions he receives from physiotherapists and social workers. He pointed out the differences in education and responsibility between "technicians" and "health professionals". He testified that x-ray technicians do not interpret pictures whereas he discusses problems with health professionals. He thought the technician was a "9 – 5 employee", although he admitted to "rarely seeing a laboratory technician". On the other hand, the health professional comes into work at any time, voluntarily, and this is expected. When asked to define a health professional with reference to the occupations relevant to these applications he excluded the medical records librarian and had difficulty in categorizing the dietitian and the respiratory technologist.

Occupational Therapy

A very good description of what this department and the occupational therapist unit does can be found in the job description of the occupational therapist position. It reads:

Position: OCCUPATIONAL THERAPIST

Qualifications: Grade 13 with Science, Physics and Chemistry. 4 Year University course leading to B.A. or BSc or Bachelor of Rehabilitation according to university trained in. Also 2 to 4 months internship.

Must qualify for membership and registration in the Canadian Association of Occupational Therapy.

Objective: The main objective of the occupational therapist is the physical and mental recovery of patients in general, psychiatric or special hospital settings. In extended care settings, the occupational therapist is concerned with providing an ongoing "activation" program which will enable the resident to maintain an interest in himself and the world around him.

An occupational therapist may work with a woman confined to a wheel chair who must learn to accomplish the many tasks with which a homemaker copes on a daily basis. He or she will assist the child with a congenital disability to develop coordination or to use artificial limbs in such a way as to become self reliant. The man who has lost a limb or has become otherwise disabled by an industrial accident may be helped by the occupational therapist to learn a new job skill or to adapt his existing skill to his disability in order to continue earning a living.

In a psychiatric setting, the objectives of the occupational therapist's program may be the relief of emotional stress, the stimulation of new interests and the development of a sense of well being and confidence through activities. Occupational therapy in the psychiatric setting will help promote social adjustment both on an individual and group basis. Other related duties as required.

The "tools of treatment" include manual and creative skills, social activities, recreational activities, remedial games, industrial and vocational skills.

The Director of Occupational Therapy is Mrs. Emma C. Greer. She has one occupational therapist working under her in the mental health unit of the hospital. From Mrs. Greer's evidence and that of Mrs. Reid, the Director of Occupational Therapy at Scarborough General Hospital, it would appear that to become an occupational therapist one has to graduate from a school accredited by the Canadian Association of Occupational Therapists and complete a four months internship. Queen's University, University of Western Ontario and the University of Toronto are the only accredited schools in Ontario. Initially, they offered diploma programmes but it is now possible to obtain a Bachelor of Science in Occupational Therapy. Occupational therapists in Ontario have not been subject to any provincial regulation and no licence or certificate is required for the practice of occupational therapy in the province. However, membership in the Canadian Association of Occupational Therapists designates a qualified occupational therapist and only those who are members in the national association are eligible to belong in the Ontario Society of Occupational Therapists, a provincial society of the national organization.

Members of the national organization subscribe to a code of ethics which was filed with the Board and reads:

"THE OCCUPATIONAL THERAPIST, by accepting the following responsibilities, is a person dedicated to achieving the highest standard of professional conduct and as such must, at any time, be able and ready to help maintain these standards of professional ethics among all occupational therapists.

THE CONSUMER (Patient/Client)

Under all circumstances the welfare of the consumer comes first. The occupational therapist accepts the responsibility to design the best occupational therapy program for the consumer within the context of both a thorough knowledge of the consumer's conditions and the most up to date treatment techniques which are available within the body of knowledge of occupational therapy.

The occupational therapist accepts the responsibility to communicate only that information regarding a consumer's condition which is necessary for the continued well being of the consumer and only under those circumstances where the consumer is informed and agrees with what information is communicated to others.

While utilizing a constructure approach to each and every consumer and safeguarding confidential information, the occupational therapist keeps the trust and confidence of the consumer.

SELF

The occupational therapist must participate in continuing educational programs and must be aware of the current knowlege of the field within which the therapist is practising. The occupational therapist makes good use of these sources of knowledge by applying such, as feasible. The occupational therapist is progressive in attitude, promoting continuing educational programs, looking for improved methodology, and taking part in research programs whenever possible. The occupational therapist accepts the responsibility to work with others, combining efforts, as appropriate, to achieve desired goals. The occupational therapist remains loyal without prejudicing an opportunity for progressive change and is constructive in giving criticism having searched out alternative progressive methods. The therapist does not participate in idle talk, e.g. groundless rumours re the consumer, other therapists, team members, colleagues.

THE PROFESSION AND COLLEAGUES

The occupational therapist accepts the responsibility to pass on any well founded new knowledge and to communicate the various aspects of occupational therapy in a progressive and proficient manner to fellow therapists, team members, other colleagues and the public in general. The occupational therapist should exert such influence, as necessary, to foster the development and improvement of the profession of occupational therapy. The therapist supports the profession's voluntary associations/societies in their endeavours to advance the profession in the delivery of effective services to the consumer.

The occupational therapist accepts the responsibility to support fellow occupational therapists in their observances of the Code of Ethics and to report any unethical conduct to the appropriate source.

THE EMPLOYING AGENCY AND THE COMMUNITY

The occupational therapist is familiar with the policies of the employing agency and abides by them. The therapist fosters and maintains good interpersonal relationships with the organization in an effort to ensure a propitious working atmosphere. Thus the occupational therapist accepts the responsibility to work in such a way as to enhance the meeting of the goals and objectives of the employing agency or facility, thereby helping to meet the needs of the community which it serves."

Mrs. Greer testified that a patient is referred to her department by a doctor and the referral is usually accompanied by a diagnosis. The occupational therapist, presumably without seeking Mrs. Greer's advice (although this is unclear), will then "evaluate" the patient and plan a treatment program which first will be discussed with the doctor. If she thought the doctor was wrong, Mrs. Greer testified that she would render treatment in any event because a doctor has greater knowledge of patient's disability. She said occupational therapists work with physiotherapists, nurses, psychologists, social workers, speech therapists and doctors. There is no direct contact with x-ray and laboratory technologists, but Mrs. Greer said their reports are relied upon. Mrs. Reid emphasized that an occupational therapist, in contrast to the job function of a technician, engages in direct patient involvement on an independent basis.

The therapist is responsible for monitoring, evaluating, and reporting the condition and progress of a patient. Mrs. Reid said that no technician was on the treatment or health care team. On cross examination she stated that because therapists exercised independent judgment they had no common interest with technicians or technologists. However, she admitted that, at present, the conditions of employment for both occupations were almost identical from the point of view of hospital policies, fringe benefits, and salaried employment. Therapists had given their support to AAHP. However, the appropriateness of representation by other trade unions had not been investigated. Indeed all the representatives of occupations supporting AAHP appeared to know very little, if anything, about the nature or quality of representation by other trade unions active in the paramedical field.

Dietetics Department

Because proper nutrition is an important element in the maintenance of good health, as well as in the treatment of rehabilitation of persons suffering from disease or disability, Stratford General Hospital employs dietitians who have specialized in the study of nutrition for both healthy and ill persons. They are responsible for the preparation and delivery of food to the patients and to the staff (the cafeteria). The job description for the dietitian position reads:

Position: DIETITIAN

Duties and Responsibilities:

1. In the absence of the Director and Assistant Director, is fully responsible for the complete department operation.
2. Interviews and recommends to the Director the hiring of new employees.

3. Participates in the orientation, induction and evaluation of employees.
4. Disciplines and supervises tray assembly, dishroom and cafeteria employees.
5. Authorized to terminate employees, discipline employees, authorized to order overtime.
6. Assume duties of food supervisors during their absence.
7. Assists in maintaining and improving standards of food preparation and service.
8. Responsible for scheduling replacements including granting permission for adjustments in days off.
9. Authority to requisition materials.
10. Participates in the planning, organizing and directing of improvements in the Dietary Department in consultation with the Assistant Director.
11. Responsible for filling the diet requisitions ordered by the doctor.
12. Consultation with doctors in regards to out-patient diets.
13. Recommendations to doctors in regards to diet changes.
14. Consultation with doctors in regards to contents of same diets.
15. Responsible for diet patient interviews and instruction both on an individual basis and in a group session.
16. Responsible for visiting patients on a daily basis.

Qualifications: University Degree in Foods and Nutrition and be a member of the Canadian Dietetic Association.

The Director of this department is Mrs. Mary C. Hodgson. She explained the educational requirements of a dietitian to the Board. There is no provincial regulation of dietitians in Ontario. The Ontario Dietetic Association (O.D.A.), a voluntary association, grants the title "Registered Professional Dietitian" to those meeting its requirements. The designation is granted under the authority of the *Ontario Dietetic Association Act*, S.O. 1958, C. 147 (a private statute). The O.D.A. requires completion of a Bachelor's degree in foods and nutrition from an accredited university and a dietetic internship or its equivalent. Members of the O.D.A. subscribe to a code of ethics which reads:

A MEMBER OF THE ASSOCIATION

WILL place service to society before personal gain.

WILL continue to advance knowledge and understanding of new developments in her own and related fields.

WILL strive to merit respect of members of her own and other professional groups.

WILL give courteous cooperation to associates and support subordinates.

WILL in no way attempt to gain advantage over other members or injure the reputation or status of another dietitian.

WILL give honest, loyal, whole-hearted service to her employers.

WILL adhere to established regulations of the organization for which she works.

WILL under no circumstances publicly endorse goods or services of firms other than her own.

WILL avoid unguarded statements that might cause trouble to her employer or the Association.

WILL respect information and confidences relating to the affairs of others.

WILL use all resources at her command to further the objectives of the Association.

WILL support and work for the growth of the Association.

Mrs. Hodgson explained that the dietitians are responsible for the preparation of therapeutic diets and in this regard they consult with doctors. She defined a therapeutic diet as a special diet as prescribed in the diet manual – a manual prepared jointly by the O.D.A. and the Ontario Hospital Association. A copy of this manual was filed with the Board and we observe that it is a detailed listing of standard and therapeutic diets and menu patterns. Mrs. Hodgson testified that a doctor prescribes a certain general diet and the dietitian prepares a specific diet from the manual. She said that, in the makeup of the diet, no judgment by the dietitian is required – “she takes it from the manual”, the Board was told. However, the dietitian can decide to substitute foods listed in the manual and in doing so would be drawing on knowledge of food, nutrition and the chemistry of food. Moreover, in prescribing a diet, doctors would appear to consult with dietitians. The Board was also told that the dietitian has daily contacts with patients but no contact with physiotherapists, occupational therapists, psychologists, social workers, pharmacists, x-ray technologists, and laboratory technologists. But despite this lack of contact, Mrs. Hodgson believed that the dietitian is a member of the health care team.

Mrs. Jean Fox, a member of the O.D.A. and Assistant Director of Food Services for Metropolitan Toronto Board of Education, testified on behalf of AAHP. She told the Board that for the past six years the O.D.A. had presented briefs on wages, inter alia, to the Hospital Council of Metropolitan Toronto. She also testified that the O.D.A. supported AAHP and a sub-committee of the O.D.A. on which she served and provided information about the oc-

cupation to AAHP on request. She felt that the persons AAHP seeks to represent have more of a community of interest with dietitians than with other paramedical occupations. On cross examination, Mrs. Fox identified a document sent to all O.D.A. members in support of the AAHP. The portion of this document we wish to comment on reads:

O.D.A. MEMBERS ARE HEALTH PROFESSIONALS

Health professionals have specialized knowledge and are educated at the university level. They form part of the treatment team, providing direct patient care and consultative services in their area of specialization. They perform and interpret their own tests and evaluation procedures, must use professional skill and judgment and are able to function relatively autonomously. They are generally members of professional associations, must meet definitive standards and abide by the ethical codes of conduct of their profession. Their role, scope, mode and area of practice, interest and needs are different to and relatively separate from those of service employees and technicians. Above all, the average health professional regards his services as necessary, if not essential, to the patient and is strongly opposed to the strike ethic.

APPROACHES TO COLLECTIVE BARGAINING

The question of where Health Professionals or Paramedical Professionals, for the lack of a better word, will fit in relation to unions will be resolved by the Ontario Labour Relations Board. This decision, in order to determine which unions will be authorized to bargain on their behalf, will be determined in the near future. Certain of these collective bargaining agencies are:

- Public trade unions (e.g. C.U.P.E., S.E.I.U., O.P.S.E.U.) generally tend to represent all employees of an institution, regardless of occupation or interests. Traditionally, the majority of their membership consists of service personnel.
- Professional unions (e.g. A.A.H.P.O., N.A.O.) are representatives of professional people who share a common community of interest in such matters of high quality patient care and the maintenance of professional ethics and standards. They represent the interests of those who are not directly involved in patient treatment and care.

PUBLIC UNIONS vs. PROFESSIONAL UNIONS

Public Unions:

- Pros – Bargaining power
Negotiate raises and benefits
Official channel for grievances
- Cons – Compulsory membership or dues deduction or both
Subject to strikes and/or militant action

Lack of concern with professional standards, ethics, education, etc.

No community of interest among members regarding type of work, occupation or work philosophy

Non-professional staff often represent professional staff at bargaining

Inadequate representation of health professionals who are a small group lumped into a large bargaining unit of workers regardless of occupation

Seniority often takes precedence over qualifications in regard to hiring and promoting.

Professional Unions:

Pros – The constitution is written for health professionals by health professions and reflects professional attitude towards labour relations

Binding arbitration as opposed to strike as a method of grievance and wage settlement

It strengthens individual professional associations by allowing them to look after education, ethics, etc. without having to contend with salaries and working conditions as well

It represents the interests of health professionals (as opposed to the interests of the vast majority which usually is made up of service workers in a public union)

As an association composed of health professionals, it is stronger in terms of its impact on working conditions, wages, standards, etc.

It promotes increased interdisciplinary cooperation

It preserves the common interests of the health professionals in the existing employment structure

It helps standardize working conditions

Portability of benefits among hospitals at which the professional association is the bargaining agent for health professionals

Standard of treatment rendered to patients is ruled by professionals, not by service staff

Cons – Militant members could spoil good management/staff relationships

There is a danger of inflexible working conditions or rules if a negotiated contract becomes too specific.

The AAHP admitted that this material was taken directly from material it had prepared and appears to be the kind of collective bargaining information that many employees affected by the application have relied upon. Unfortunately, it is self-serving and arguable. For example the second paragraph describing who C.U.P.E., S.E.I.U., and O.P.S.E.U. represent obscures the fact that "service personnel" cannot be included in a bargaining unit with the paramedical occupations with which this Board is dealing and the section describing the

“Cons” of public unions fails to explain that strikes are outlawed in the public hospital sector.

Indeed, Mrs. Fox admitted that no “public trade union” had been contacted to ascertain their views on the representation of dietitians.

On cross examination Mrs. Fox emphasized the differences in education between technologists and university trained dietitians, but Mr. Stringer was quick to point out the differences in education between dietitians and psychologists who must have a Ph.D. As well, Mrs. Fox did not think nurses were health professionals because many were not university trained.

Mr. Paliare, counsel to OPSEU, questioned Mrs. Fox with respect to the O.D.A. sub-committee’s consultation with the AAHP. She said that AAHP representatives were in the process of drawing up that association’s constitution and requested the bylaws, code of ethics, and the number of members of the O.D.A. On questioning by Mr. Paliare, Mrs. Fox admitted that she had the power to hire and fire on behalf of her employer. On the conclusion of her evidence Mr. Paliare then made a motion to have the AAHP application dismissed because of employer involvement in its formation. The Board heard argument on this motion and reserved its decision. We have now considered this request and have decided to dismiss the motion. The Board is satisfied that consultation with people of Mrs. Fox’s status in her capacity as a member of an established occupational association does not, in the circumstances of this case, affect the status of AAHP as a trade union for the purposes of the *Labour Relations Act*. Nor do we believe that support by an established occupational association ought to affect the status of AAHP although we think such associations would be better advised to be more cautious in their commitment to one or another trade union.

Medical Records Department

The basic duties of the medical record personnel are to assure that adequate patient records are maintained and filed. These records include information on the diagnosis, treatment, test results, and continuing progress of the patient. The Director, Ms. Carolyn MacMillan gave evidence. She and the assistant director oversee this process which includes assembling a patient’s record on discharge, quantitative analysis of the medical chart to ensure that it is complete, and abstracting of the chart. An accredited record technician performs the quantitative analysis. Coding and abstracting is done by both the technician and the librarian. This application appears to deal only with the librarian.

Ms. MacMillan stated the course of study for a medical records librarian consists of two years at a school for medical librarians approved by the Canadian Association of Medical Record Librarians (C.A.M.R.L.). These schools are administered by a number of hospitals. *The Report of the Committee on The Healing Arts*, Vol. 2, p. 407 states that the educational prerequisite for the medical record librarian schools is senior matriculation, a nursing diploma from an accredited nursing school or an elementary teaching certificate. C.A.M.R.L. has developed a certification program, and only medical record librarians who have passed the Association’s registration examination are permitted to designate themselves as a “Registered Record Librarian”. However, registration is not mandatory in that the Association is a private one. An Ontario Association of Medical Record Librarians also exists to which Ms. MacMillan belongs. Members of C.A.M.R.L. subscribe to a code of ethics which reads:

"It is the duty of the members of the Canadian Association of Medical Record Librarians to remember:

1. That the welfare of the patient is primary.
2. That the professional code of ethics placed upon the physician applies in like manner to the medical record librarian.
3. That she must preserve and protect medical records and hold inviolate the contents thereof and any confidential information obtained in the course of her official duties.
4. That she must refuse to participate in or conceal unethical practices or procedures.
5. That she must recognize the source of authority and powers delegated to her and remain always within their scope, placing service before material gain.
6. That she must respect her position of trust and maintain unquestionable honesty and integrity.
7. That she must endeavour to conduct herself in such a manner as to promote honour for the profession and the best interests of the Canadian Association of Medical Record Librarians, upholding the dignity of the profession while safeguarding the policies of her hospital.
8. That she must constantly strive to improve her professional knowledge and skill by seeking counsel and guidance from all available sources.
9. That she must constantly abide by the objectives and rules of the Canadian Association of Medical Record Librarians and loyally support its undertakings.

The job description of the assistant director position reads:

Position: ASSISTANT DIRECTOR OF MEDICAL RECORDS

Summary: Works under the supervision of Director of Medical Records. Is the immediate supervisor of a staff which includes dicta typists, accredited record technicians, clerk typists, and stenographers. Other duties - hiring, firing and disciplining of all employees, schedules staff, arranges time off, in charge of the medical library, coding, abstracting and batching, use of hospital statistics for research purposes.

Work To Perform:

1. Be able to code according to ICDA-8, complete HMRI 1975 abstracts and batch according to the HMRI coding manual.

2. Must interpret accurately HMRI-outs for research purposes, graphic presentations, etc.
3. Follow the cataloguing system set up for the library for incoming journals and books. Make the physician in charge of the library aware of new publications and order materials as he requests, keeping within the library budget.
4. Have a working knowledge of the four basic management functions: planning, organizing, controlling and actuating.
5. Be able to establish good interdepartmental relations, assign certain tasks to employees, and to have a good rapport with the medical staff.
6. Handle telephone calls and other requests for release of information from the medical record.
7. Gives guidance and direction to employees, must be familiar with all job descriptions, and the operation of all equipment.
8. Attends Medical Record Committee meetings, Admission and Discharge Committee meetings, and any other meetings whenever requested.
9. Assumes the duties of the Director of Medical Records in the event of her absence.
10. Performs any other tasks assigned by the Director of Medical Records.

Qualifications: Minimum – be a graduate of a recognized school for Medical Record Librarians

Ms. MacMillan testified that the librarian has no contact with patients or with any of the paramedical occupations. *The Report of The Committee on The Healing Arts*, Vol. 2, p. 405 describes certain duties thought to be basic to the efficient running of a medical records department: for example, reviewing the records of patients to ensure that the standards of the Canadian Commission on Hospital Accreditation are met; coding and indexing disease conditions, operations and special treatment; assisting staff in medical research; preparing statistical and narrative reports on the utilization of the hospital or clinic; and serving on the hospital's Medical Records Committee. The report went on to recommend that medical record personnel be certified by the Health Disciplines Regulation Board, through a Division for Medical Personnel – a recommendation common to all of the paramedical occupations it considered.

Respiratory Therapy

The Director of the Respiratory Therapy Department is Mr. Gerald W. Pafford. He supervises one respiratory technologist and a registered nursing aide. Mr. Pafford told the Board

that a respiratory technologist's job is to assist the physician in the care and management of patients with acute and chronic cardio-pulmonary disorders, i.e. any abnormality that affects the lungs or heart. More specifically, the job entails artificially ventilating a patient; arterial punctures to collect blood for arterial blood gas analysis by the laboratory (indeed the respiratory technologist is the only person in hospital sanctioned to do this work); various forms of therapy or treatment to assist a person's breathing and this treatment may involve the administration of drugs (one drug can be administered intravenously while others are pills or aerosols); the performance of pulmonary function tests to ascertain the nature of a patient's problem, testing to ascertain the nature of a patient's problem; testing of respiratory equipment for cleanliness; and monitoring of patients on respiratory equipment.

Mr. Pafford testified that a technologist usually receives a generally worded referral direction from a doctor concerning a patient. The technologist then attends the patient; examines the patient chart; talks to and observes the patient; may perform tests and listen to patient's chest; and after these activities, begins a course of treatment or recommends one to the physician. Seventy per cent of the respiratory technologist's time is spent in looking after patients in intensive care and treating patients on the wards. Technologists can recommend that patients go on or come off mechanical ventilation and they monitor the progress of patients on such devices. In an emergency, if an anaesthetist is not available, a technologist may insert an endotrachea tube into a patient's trachea to assist the patient's breathing. Technologists make their own decision whether pulmonary functions tests are to be conducted and they interpret the results of these tests for doctors.

Mr. Pafford stated that the respiratory technologist often works quite closely with the physiotherapist. Together they may attend on a patient who has retained secretions, or is hypo-ventilating or experiencing broncho spasms. The technologist will administer a broncho dilating drug and intermittent positive pressure breathing treatment while the physiotherapist performs "posturing, drainage and percussion". The technologist often consults with the internist as well as with laboratory technicians.

A patient goes on a mechanical respirator when his own respiration is inadequate to maintain life. Arterial blood gas analysis and pulmonary functions testing are important methods of determining whether a patient is in need of mechanical assistance or if the mechanical assistance is adequate. The technologist plays the primary role in conducting and evaluating these tests. The results of an arterial blood gas analysis is conveyed by a laboratory technician to a nurse in the intensive care unit who in turn relates the values to the respiratory technologist. The technologist then decides on the basis of this information whether the mechanical assistance is adequate or whether there is a "metabolic" problem – that should be immediately reported to a physician.

The job description of the respiratory technologist reads:

Definition of Title: A person who, through formal training at an approved School of Respiratory Technology, is "Registered" or "Registry Eligible" with the Canadian Society of Respiratory Technologists.

Responsible To: All technologists will be responsible to the Director of the Respiratory Technology Department.

Responsibilities: Immediate supervision of other staff in the department.

- Assist in cardio-pulmonary resuscitation when required, anywhere in the hospital.
- Instruct, when necessary, other hospital personnel in the operation and function of equipment related to respiratory technology.
- Maintain accurate records of in and out-patient treatments and related information.
- Report to the Director of Respiratory Technology, any and all pertinent information related to the safe and efficient operation of the department.
- Maintain ethical standards of behaviour, relating to patient care, departmental function, and hospital operation at all times.
- Perform other related duties as required.

On The Written Orders Of A Physician:

- Arterial punctures (radial and brachial) for the purpose of blood gas analysis, and then only when certified as competent by the appropriate medical authority.
- Pulmonary function testing on in and out patients.
- Administration of accepted forms of treatment to in and out patients within the scope of training of a respiratory technologist.
- Assist in the care and management of patients being mechanically ventilated.

The education of a respiratory technologist involves two years of post-secondary school instruction in an accredited school of respiratory technology. These programs are now conducted in community colleges and Mr. Pafford said that the programme offered by one school was three years in length. There is no provincial regulation of this occupation. However, the Canadian Society of Respiratory Technologists, a private organization, recommends standards of instruction and, in conjunction with the Canadian Medical Association and Canadian Anaesthetists Society, conducts oral and written examinations for graduates of such programmes who wish registration. The members of this Society subscribe to a code of ethics which reads:

Preface

The fundamental aim of the Respiratory Technologist is the dedication of unselfish, understanding and intelligent service in treating conditions associated with respiratory pathology. An appointment to continue the work of healing which Christ began on earth. It is based on ethical values which have as an end the ultimate good of the whole person regardless of race, creed,

nationality or economic status. These ethical values are set forth in a code based on the natural moral law which all members are obligated to observe. This demands personalities of intelligence and integrity further developed by education and specialized training to a realization of rights and duties in regard to the speciality, the physician, the patient, the employer, associates and the public.

Although the private life of the Respiratory Technologist is not a proper matter for an ethical code, it must be remembered that no action while on duty or off, can be divorced from the reputation of this paramedical specialty as a whole.

THE PHYSICIAN

1. The Technologist has the obligation of conscientiously implementing the physician's order in the administration of respiratory technology. The legal and professional responsibility rests with the physician.
2. The Technologist has the obligation of providing the physician with intelligent, alert and progressive service in the sense of keeping up with the latest techniques.

THE PATIENT

1. The Respiratory Technologist renders service to the patient as one who is in need of his special skills. The Technologist therefore transcends such things as ethnological, religious and economic considerations.
2. The Respiratory Technologist is responsible for competently and efficiently administering the therapy prescribed.

THE SOCIETY

1. The fundamental aim of the medical profession is, in all instances, to conserve life and promote health. The knowledge and services of the Respiratory Technologist must be used solely for the achievement of this aim.
2. In as much as scientific research daily contributes to the improvement of methods, techniques and materials, the Respiratory Technologist has the obligation to promote his competency through continued study, observation and investigation.
3. Membership in the Canadian Society of Respiratory Technologists indicates sincere interest on the part of the technician.
4. The Respiratory Technologist should maintain personal habits of grooming and conduct which are in keeping with the same qualities demonstrated by other members of the team, thus inspiring respect and confidence.
5. The ethical Technologist holds in strict confidence all information of a personal or private nature.

THE EMPLOYER

1. The Respiratory Technologist should seek employment on the basis of his qualifications and experience only.
2. Contracts, written or oral, made by the Respiratory Technologist with the employer should be fulfilled in letter and in spirit. Changing circumstances may justify subsequent requests for modification of the agreement.
3. The Respiratory Technologist may justly expect the statements regarding the quality of his work will not only be true but confidentially given and received by his employer.
4. The Respiratory Technologist has a right to a just remuneration for his services; acceptance of additional compensation is unethical.

THE ASSOCIATES

1. The Respiratory Technologist should always be courteous to associates, according them understanding, help, encouragement and loyalty. The Technologist should be especially interested in the development of younger workers.
2. In the practice of the specialty the Respiratory Technologist should disclose procedures which are incompetent and dishonest, to proper authorities. The technician should at all times avoid unfavourable comment about associates to others.

THE PUBLIC

1. The Respiratory Technologist should realize that he has an obligation, by virtue of his citizenship, to the community as a whole. The Technologist should conscientiously fulfil the duties of a citizen by participating in community planning and promotion of good public relations.
2. The Respiratory Technologist has an obligation to share the knowledge and skill of the specialty with others who are working for the common good. The cause to be served must supersede the private good of the Respiratory Technologist.
3. Although a Respiratory Technologist should exercise the right to constructive criticism, he should be loyal to his specialty, his organization and his community.

Speech Pathology The job description of the Speech Pathologist position at Stratford General Hospital reads:

Position: SPEECH PATHOLOGIST

Qualifications: After Grade 13, a four year university programme leading to the degree of Bachelor of Science in communicative disorders.

Objective: The Speech Pathologist is responsible for the diagnosis and treatment of patients with disorders of speech, voice and language. Performs other related duties as required. Children and adults both, may receive help for such problems as stuttering, loss of voice and unintelligible speech.

Only one speech pathologist or therapist is employed – Mrs. Joan D. Szymbersky – and she is the Director of Speech Pathology. The hospital is actively seeking another therapist to assist her. Mrs. Szymbersky has a Bachelor's in Psychology from the University of Guelph and successfully completed the two year post graduate diploma course in speech pathology and audiology offered at the University of Toronto under the Department of Rehabilitative Medicine within the Faculty of Medicine. There is no provincial regulation of this occupation; however, there exists a private statute entitled *The Ontario Speech and Hearing Association Act*, S.O. 1965 C. 161, which continues the private association as a body corporate and politic. The goal of the Association is to increase the knowledge, skill and proficiency of its members. Admission requirements are set and an Executive Council is given authority to make bylaws with regard to a code of ethics, to govern discipline, and conduct, and the admission and expulsion of members. Mrs. Szymbersky had never seen a code of ethics for the discipline and, as noted, there is no requirement that persons join the Association before practising or before using certain titles.

All the speech pathologist's patients are referred by a doctor. The pathologist then assesses the patient and a recommendation is sent to the doctor for approval. The assessment involves conducting tests with and without specialized equipment. Mrs. Szymbersky stated that a speech pathologist might work or consult with doctors, physiotherapists, occupational therapists and psychologists, and there would be no such dialogue with x-ray and laboratory technologist nor with pharmacists. However, she stated that the speech pathologist would rely upon the information provided by x-ray technologists.

Department of Psychology

The Department of Psychology at this hospital was established in September, 1974. At present, the department is composed of one psychologist and psychometrist. Their respective job descriptions read as follows:

Psychologist: Positions allocated to this classification entail complex and responsible psychological duties in a hospital, educational, correctional or research setting. The incumbents plan, conduct or supervise individual or group therapy and behavioural modification programs and administer, evaluate and interpret a complete range of psychological tests. They generally function in collaboration with, and provide professional supervision to members of treatment staff from a number of disciplines.

Review the work of the psychometrist with an eye to providing guidance and establishing limits.

They utilize a large variety of psychological procedures both standard and experimental in assessing, describing and measuring dysfunction, disability or impairment. They interpret the disabilities and special needs of patients, students or inmates, institutional staff, teachers or parents, and plan and apply appropriate techniques of psychotherapy, constantly appraising the efficacy of treatment and rehabilitation programs.

Qualifications: Registration as a Psychologist in the Province of Ontario. Ability to organize, coordinate and supervise psychological services. Personal suitability.

Psychometrist: Incumbents of positions allocated to this class are under the supervision of a psychologist. Duties include identification of emotional maladjustment, behaviour patterns and the mental level of patients, students and/or inmates. Further, they are responsible for administration, scoring and interpretation of intelligence, personality, academic, occupational and aptitude tests.

The work of the psychometrist is to be reviewed by a psychologist with an eye to providing guidance and establishing limits.

They may make recommendations on treatment, training and placement of patients, students and inmates, subject to the approval of the supervising psychologist. They also prepare reports incorporating test findings which assist in the diagnostic and therapeutic decisions of the psychologist or psychiatrist. Similarly, they may participate in the collecting and processing of research data.

Qualifications: Graduation from a university of recognized standing and a Masters Degree in Psychology. Preferably some previous related experience. Personal suitability. Ability to establish harmonious working relationships with professional personnel and patients, students or inmates.

Mrs. Nancy E. Wilson is the psychologist and she is the Director of the department. She told the Board that initially the department's role was confined to clinical assessment activity involving the administration of psychological tests to evaluate a patient but its role has now expanded into treatment activity. The psychometrist is a tester of a subject's functions i.e. cognition, vocational, intellectual, personality, interests and aptitudes. However, at Stratford General Hospital both the Director and psychometrist perform psychological tests and treatment. All patients are seen on the referral of a doctor, and a recommended course of treatment is cleared with the doctor. Mrs. Wilson stated that the psychologist is likely to have contact on a regular and continuing basis with doctors, nurses, social workers, occupational therapists and speech therapists.

The Psychologists Registration Act, R.S.O. 1970 C. 372 provides for an Ontario Board of Examiners in Psychology. The responsibilities of the Board are to maintain a register of psychologists and to exercise regulatory and disciplinary controls covering the practice of registered psychologists. No person can hold himself out to be a psychologist unless he holds a certificate. Although efforts have been made by the Ontario Psychological Association to establish standards and provide machinery for accreditation of applied programs, the Act does not provide for it. For the purposes of registration the candidate is required by the Ontario Board to have a Ph.D. and at least one year of experience acceptable to the Board. The Act does not apply to psychometrists, the majority of whom possess a Masters degree in psychology. Mrs. Wilson said the members of the Ontario and Canadian Psychological Associations subscribe to a code of ethics but such a code was not filed with the Board. Finally Mrs. Wilson told the Board that psychologists worked on their own in determining what tests to conduct and in carrying out a course of treatment recommendations.

The Board also heard the testimony of Dr. M. F. Madill who is employed as a psychologist at Whitby Psychiatric Hospital. She testified that scientific and professional employees of the Province of Ontario are in categories separate from technical employees and bargain separately. However, it was unclear from her testimony whether graduates of a community college were considered to be technical employees or professional and scientific. She went on to make a distinction between employees engaged in direct patient care in contrast to in-

direct care. She believed those employees engaged in direct patient care were highly skilled persons concerned with considerations beyond overtime pay and work schedules. On cross examination, she admitted that at her place of work the terms and conditions of employment were the same for both groups and stated that integrated local bargaining for *all* occupations at the Whitby Hospital worked very well.

Social Service Department

The job classification of the "professional social worker" position at Stratford General Hospital appears in the following terms:

A Social Worker in the Social Service Department of Stratford General Hospital will be involved in all aspects of the delivery of service to the hospital and community. The primary function of the social worker will be to deal with those stresses affecting the social, emotional, and economic life of the patient in as far as it is a deterrent to his/her health and welfare.

Qualifications:

- (a) Master Degree in Social Work from a recognized School of Social Work.
- (b) Membership in the Ontario Association of Professional Social Workers.

Duties:

- (a) The Social Worker shall be involved specifically in the following:
 - 1. Assisting patients and family to adapt to illness.
 - 2. Psychosocial aspects of illness.
 - 3. Discharge Planning.
 - 4. Facilitation of services.
 - 5. Social evaluations.

The mediums through which the Social Worker will deliver these services are – individual counselling; family therapy; marital counselling, and group therapy. The social worker at Stratford General Hospital shall be functional in all these mediums.

- (b) To provide a professional case work service to patients, physicians, hospital, and community.
- (c) To receive referrals directly, concerning both in-patients, from attending physicians on the staff of Stratford General Hospital.

- (d) To become involved in all aspects of the delivery of service to patients in all areas at Stratford General Hospital.
- (e) To take an active part in the supporting and development of programs for patient care.
- (f) To become involved in the educational programs within the hospital for both social workers and other disciplines.
- (g) To become actively involved with other community agencies to identify the needs of the community and to implement services.
- (h) To maintain, as much as possible, up-to-date recording.
- (i) To perform tasks so determined by the Director of the Social Service Department which will be in line with hospital function and professional service to the patient and/or his/her family.
- (j) Performs other related duties, as required.

Responsibility:

Each social worker will be directly responsible to the Director of the Social Service Department.

Relationship:

Under normal circumstances a patient may only be referred to the Social Service Department through a medical director or with his/her knowledge. The worker may then in turn share information with the doctor and other members of the medical treatment team, about the patient which may lend wider scope to the picture of the patient as an individual. The worker sees the patient as part of a family group, and as part of the community group, whether employed or unemployed. With the knowledge the worker gains from and about the patient, he/she is then in a position to see the total person in relation to his past, present, and in some cases his future. The worker learns how the patient handles stress; his aspirations and ambitions; his past achievements; his potentials and capabilities; and relate this information to the patient as a total person. In short, the workers learns a "great deal about a patient as a human being; his attitudes towards himself and others; his hopes, ambitions and fears; and his understanding of his illness and hospitalization means to him and his family."

This knowledge is in turn shared with the doctor and members of the treatment team through verbal and written reports, and a skilled social history is helpful, both in diagnosis and in treatment planning. The social worker is also a member of the treatment team as a therapist, for, with the skills and knowledge of the Social Worker position, the worker is able to relieve stress, create emotional stability through a healthy problem-solving process, and assist the patient in arriving at a more comfortable style of living.

Mr. Murray F. Bishop is the Director. He testified that the Department receives patients on the referral of a physician and that a counselling program is recommended to the physician after the social worker has evaluated the patient. He stated that the doctor's opinion must prevail if there is any difference in opinion. Mr. Bishop considered all paramedical occupations to be members of the treatment group in that, either directly or indirectly, they all played a significant role in the treatment process.

Until very recently, the only programs available for training in the field of social work in Ontario were Master of Social Work (M.S.W.) programs available at a number of universities. The admission requirements for a M.S.W. program is a B.A. degree. The Ontario Association of Professional Social Workers was founded in 1964 but membership in the Association is not mandatory for the practice of social work in Ontario. However, some employers, like Stratford General Hospital, require membership as a condition of employment. Members of the Association subscribe to a code of ethics but the code was not filed with the Board.

10. Mr. Cameron testified that the terms and conditions of employment for all of these occupations, aside from specific salaries, are identical. All are salaried and all have the same vacation entitlement and the same number of paid holidays. Each occupation requires a probationary period of the same duration and each occupation works the same number of hours in a week (an exception is the 40 hour work week of dietitians). The fringe benefits of all these occupations are also identical.

11. The Board also heard from Dr. John S. W. Aldis, Chief Executive Officer for Project Development and Implementation of the Ministry of Health. He explained the evolving nature of the health care team concept. In considering the occupations before this Board he made the general observation that technicians were a resource to the team but not members of the team. He characterized health care professionals by reference to educational standards, responsibility for direct patient care, the existence of a discipline requiring the judgment of performance by peers, and the shouldering of responsibility for certain decisions and the capacity to give advice about treatment. He characterized the technologist occupation as an information system. However, he admitted that his experience with hospitals was confined to one hospital located in Burlington. He also stated that, when in private practice, over seventy per cent of his referrals were to the laboratory and x-ray departments of the hospital. Finally he observed that experienced technologists do give their opinions to physicians and inevitably there is dialogue between the two occupations.

12. Finally, Dr. Walter F. Lumsden, Executive Director of Personnel, Health Division, Ministry of Health, testified before the Board. Mr. Gordon, without objection from opposing counsel, introduced a document captioned "1976 Operating Budgets", sent under the signature of Mr. W. Alan Backley, Deputy Minister of Health, to all public and private hospitals. This document contained a paragraph characterizing "paramedical staff" as "working level and group leader technicians/technologists in laboratory, radiology, respiratory, EEG, ECG, pulmonary function, pharmacy and related service" and "professional staff" as "working level social workers, psychologists, dental hygienists, physiotherapists, occupational therapists, speech therapists, audiologists, pharmacists, child care workers, psychometrists, etc.". He indicated that the Ministry was looking for increased roles in the latter category as opposed to the paramedical group; however, he was not responsible for the paramedical group.

13. We have reviewed the evidence in detail to provide its full flavour and we now consider its significance to our determination. First of all we would observe that the Board is obligated to determine the unit of employees that is appropriate for collective bargaining and not the appropriateness of a particular bargaining agent. We make this distinction because of the presentation of some evidence that pertained to the appropriateness of a particular bargaining representative – for example, the document distributed by the O.D.A. to its members. Indeed, at least one witness expressed the view that one bargaining unit was adequate if the bargaining agent was the AAHP. Whatever the unit the Board finds appropriate both trade unions may organize on that basis.

Another point worth making at the outset is the inherent tension between the Board's responsibility to fashion practical bargaining structures and the equally important concept of freedom of association expressed in section 3 of *The Labour Relations Act*, R.S.O. 1970 C. 232, as amended. In *Ponderosa Steak House* (1975) O.L.R.B. Rep. Jan. 7 the Board expressed this relationship well in writing:

"A primary theme set out in *The Labour Relations Act*, and affirmed by the Board, is the principle of freedom of association. The preamble to the Act makes it clear that it is the intention of the Legislature to encourage collective bargaining "between employers and trade unions as the freely designated representatives of employees". More specifically, section 6(1) of the Act expressly provides that the wishes of the employees as to the appropriateness of the unit are to be considered by the Board. In other words, the Act recognizes that it is desirable that employees be able to organize in a form that corresponds with their own wishes. Given this legislative policy favouring the right of self-organization, the Board must be careful that its determination as to the appropriateness of the bargaining unit has given proper weight to the wishes of the employees. An earlier decision of the Board, *The Board of Education for the City of Toronto*, July O.L.R.B. Monthly Report 30, clearly endorses such an approach. In giving due consideration to the wishes of the employees, the Board, in the absence of contrary evidence must assume that their wishes are expressed by the applicant union as the representative of the employees. This point was made by the Board in *Board of Health of the York-Oshawa District Health Unit*, 1969 June O.L.R.B. Monthly Report 340.

The right of self-organization, however, must at times compete with the need for viable and harmonious collective bargaining. Section 6 of the Act specifically requires the Board to determine, not just a unit of employees, but "the unit of employees that is appropriate for collective bargaining". In other words, the Board has a responsibility under the Act to create a rational and viable collective bargaining structure, even though the exercise of this responsibility may sometimes conflict with the right of self-organization. This responsibility was recognized by the Board in the *McMaster University* case, 1973, February O.L.R.B. Monthly Report 102, and in the *Board of Education for the City of Toronto* case, *supra*.

The determination of what constitutes a viable collective bargaining structure requires the Board to consider matters of industrial relations policy,

such as community of interest and fragmentation of employees. Community of interest may be a requisite for viable collective bargaining, since the representation of disparate employee groups by one bargaining agent may put impossible strains upon it as it performs its role in the bargaining process. At the other extreme, a too narrow definition of community of interest may create undue fragmentation of employees, leading to a weak employee presence at the bargaining table, or the possibility of jurisdictional disputes among competing bargaining groups. It should be observed, however, that the Act does not create any presumption in favour of the most comprehensive unit of employees, even though these employees may have a community of interest. Section 1(1)(b) of the Act states that "‘bargaining unit’ means a unit of employees appropriate for collective bargaining, whether it is an employer unit or a plant unit or a subdivision of either of them".

This provision makes it quite clear that the determination of appropriateness does not always lead to the conclusion that the most comprehensive unit is also the most appropriate unit. Consideration of the wishes of employees, and of industrial relations policy, may very well dictate that a smaller bargaining unit is the appropriate unit. This point was clearly made in *Board of Education for the City of Toronto case*, supra.

But unfortunately, these themes merely describe conflicting impulses in any one case and do not provide concrete solutions. Ration, solutions lie in the careful examination of evidence for significant differences in community of interest between occupational groupings bearing in mind the structural requirements for effective collective bargaining and labour relations. At the risk of being repetitive we think it important to observe that it is natural for certain groups of employees to be apprehensive about the outcome of collective bargaining if their occupation does not dominate a bargaining unit in sheer numbers and seldom is the Board confronted with applications for certification affecting employees with identical interests, abilities and backgrounds. Thus, if the Board was to be preoccupied with these apprehensions an unmanageable proliferation of potentially ineffective bargaining units would be the likely result. Accordingly, the Board must concern itself with only significant differences between employee interests and these significant differences must result in practical bargaining unit demarcations – practical in the sense that demarcations must provide efficient answers to like cases; there must be reasonable assurance that they can withstand the passage of time; and practical in the sense that sound collective bargaining relationships can be built upon them.

14. The broadest principle of bargaining unit demarcation suggested in this case was a "professional/technical" distinction. In fact, the distinction was often used by the parties for a shorthand reference to the two groupings of occupations that the AAHP application seeks to have this Board adopt. Thus the first step in our decision is to see if this distinction reflects a significant difference between the two groupings proposed and assess whether it results in a practical bargaining unit demarcation. We might start by asking what are the differences between professional employees and other occupations? We ask this question assuming that the answer will reflect a distinct community of interest that can be considered in assessing the appropriateness of the bargaining units proposed by AAHP. A review of the relevant literature reveals numerous factors against which claims of professional status are often measured and we find it appropriate to begin with the most comprehensive criteria of

professional status. In this respect, we adopt the twofold distinction made by Harold L. Wilensky, a respected commentator, that (1) the job of the professional is technical – based on systematic knowledge or doctrine acquired only through long prescribed training; and (2) the professional adheres to a set of professional norms. (See Wilensky, *The Professionalization of Everyone* (1964) Am. J. of Soc. 137 at 138). He goes on to define “technical” in the sense that preference in hiring is given to those who have proved competence to an agency external to the hiring firm or consumer. And the term “professional norms” is meant to refer to “the existence of a set of moral norms that dictate not only technically competent, high-quality work, but an adherence to a service ideal – devotion to the client’s interest.”

Applying only these criteria to the facts at hand, we find that all of the occupations might merit the designation professional to a lesser or greater extent. All of the occupations require a not insignificant period of post-secondary education in a specialized institution that passes on the competence of a graduate, although important differences in the length and nature of training between occupations undoubtedly exist. Further, all of the occupations are represented by associations that have promulgated codes of ethics to which members subscribe. As well, the associations have played important roles in the establishment of training programmes; and whether or not an association’s approval of a graduate is a statutory requirement, preference in hiring is invariably accorded to members of the various associations or those eligible for membership – almost a form of private accreditation. Therefore, while this initial and generalized approach to the professional/technical dichotomy sheds some light on the competing interests that underlie this case, it does not reveal sufficiently distinct differences to support the request of AAHP. Indeed, if anything these two general criteria are supportive of the OPSEU application.

15. In becoming somewhat more specific, and once again drawing on Wilensky, we find his observation that there is a “process of professionalism” which some occupations complete and thereby come to be recognized as “professional” occupations very interesting. He described the process in the following terms (p. 146):

“As seen, there is a typical process by which the established professions have arrived: men begin doing the work full-time and stake out a jurisdiction; the early masters of the technique or adherents of the movement become concerned about standards of training and practice and set up a training school, which, if not lodged in universities at the outset, makes academic connection within two or three decades; the teachers and activists then achieve success in promoting more effective organization, first local, then national – through either the transformation of an existing occupational association or the creation of a new one. Toward this end, legal protection of the monopoly of skill appears; at the end, a formal code of ethics is adopted.”

It is striking how all the occupations with which the Board is concerned appear to have followed or, more importantly, are following this pattern or a variation of it. Laboratory technologists have not been concerned with an exclusive jurisdiction but have formed local and national associations that play a significant role in the setting of educational and ethical standards. Members of the associations subscribe to a code of ethics. And, while there has been no regulation of laboratory technologists in Ontario, the Canadian Society of Laboratory Technologists “certifies” its membership and the hiring practices of hospitals appear to tie into membership or eligibility for membership in the Society.

Radiological technologists have not achieved exclusive jurisdiction in their work either, but a public statute does provide for certification and registration under this statute and carries with it the exclusive right to the use of the designation "Registered Radiological Technician". Moreover, occupational associations have been formed and play a significant role in the determination of educational standards. Educational programmes are now conducted by community colleges. A code of ethics exists.

The pharmacist occupation has clearly completed the process. Education occurs at the university level and it is one of the five health disciplines regulated by *The Health and Disciplines Act*, 1974, S.O. 1974, C. 47. This Act provides that no person can hold himself out as acting as a pharmacist unless he is licensed under this Act and the occupation regulates its own conduct through the Ontario College of Pharmacists. But while there is statutory authority for the promulgation and enforcement of the occupation's code of ethics, the legislation does not apply to drugs dispensed in a hospital – the institution affected by these applications.

Physiotherapists are required by *The Drugless Practitioners Act*, R.S.O. 1970, C. 137 to be registered and a penalty is provided for persons who practise while not registered. Thus this occupation has developed an exclusive jurisdiction like pharmacy. Education is at the university level and associations play a role in the formulation of educational standards. On the other hand, occupational therapists have not attracted any legislation to carve out an area of exclusive activity although education is at the university level and associations have been formed and members subscribe to a code of ethics.

The work of dietitians is not regulated by a public statute either, but under the *Ontario Dietetic Association Act*, S.O. 1958, C. 47, it is unlawful to hold oneself out to be a Registered Professional Dietitian unless one is. As the name of the statute suggests, an Ontario association has been formed. Members subscribe to a code of ethics and the Association has an interest in standards of educational programs which are conducted at the university level.

The work of a medical record librarian is not regulated by statute but an association exists and members subscribe to a code of ethics. The association has evidenced a concern for the standards of educational programs centered at a number of hospitals. Some post-secondary education appears to be a prerequisite to entrance in these programs.

Respiratory technologists have an association that has played a significant role in developing standards for educational programs conducted at the community college level.

Psychologists are required to obtain a certificate of registration under the *Psychologists Registration Act*, R.S.O. 1970, C. 372 and a Ph.D. is a condition precedent to registration. However, a psychometrist is not required to register but is usually in possession of a M.A.

Social workers have an association and are university graduates as is the case for speech therapists.

It can be seen that all the occupations appear to be proceeding along this so called "process of professionalization" and after reviewing each occupation's progress we are of the opinion that specific points along the process do not provide a clear enough demarcation for bargaining unit determination purposes. For example, of the occupations

sought to be represented by AAHP, only pharmacists and physiotherapists have achieved a licensing type of legislation. Moreover it is very interesting to note that the *Report of The Committee on The Healing Arts*, 1970 V. 2 has recommended that all the occupations affected by this determination be regulated in approximately the same manner and under the same statute. We are of the opinion that all of the occupations have made sufficiently significant progress along this path of professionalization that no one occupation or a group of occupations can claim a unique or distinct community of interest in this regard, at least for the purposes of the Labour Relations Act. We are very hesitant to rely on the existence of licensing, registration and certification statutes with respect to certain occupations to grant special status under a labour relations statute to the salaried members of those occupations. To a great degree these statutes have been enacted to protect an inexperienced public from the unqualified or unscrupulous practitioner and say little or nothing about the community of interest of the salaried members of a profession with other occupations. In fact where the consumer is a small number of sophisticated employers or where the occupation does not consult or practise with respect to a broadly based lay clientele, licensing statutes are less relevant and less likely to exist. Moreover, and as we have seen in this case, an effective accreditation system need not depend on a statute. It is quite clear that the hospital employers privately administer their own system by stipulating educational achievements and membership eligibility in occupational associations as a condition of hiring. On the other hand, except for the medical record librarian, all of the occupations named in the AAHP application receive their training at the university level and thus the question arises as to whether this difference can support the AAHP request.

16. The Board has three principal concerns with this criterion. Educational qualifications can be divorced from the nature of the work actually performed and the concern has been recently expressed that educational requirements may be artificially high. (See Commission on Post-Secondary Education, p. 66). In fact in a recent case before the Canada Labour Relations Board professional engineers were not granted professional status because employees without their educational qualifications performed the same work. (See *Association of Engineers of Bell Canada* (1976), Canadian L.R.B.R. 345). Further it can be argued that the criterion is capable of manipulation by any occupation "pursuing a calculated course designed to upgrade (its) status and, if at all possible move (itself) into the charmed circle of recognized professions". (See Kleingarten, *Professionalism and Salaried Worker Organization* (1967) p. 23). While we are not suggesting that physiotherapists have followed any such calculated course, an illustration of the educational criterion's weakness as, at least, an exclusive determinant is found in the report of *The President's Research Committee of the Committee of Presidents of Universities of Ontario*, where in discussing physiotherapists, it states:

"... the large numbers of health personnel required should be trained in hospital schools or technical colleges in shorter programs with less stringent requirements, while at the same time providing a means for such graduates to enter university degree programs possibly with advanced standing for specially qualified graduates of diploma schools".

(See *Report of the Committee on The Healing Arts*, (1970) Vol. 2, p. 365).

And although the *Committee on The Healing Arts* concluded that physiotherapy was an appropriate discipline to be taught in a university, it apparently came to this conclusion be-

cause of a concern for the development of postgraduate programmes necessary for the preparation of teachers and senior administrators (see Vol. 2, p. 366). Secondly, the factor can amount to a very static definition in the face of something so dynamic as occupational change. We note that none of the occupations started out with a university level educational requirement and those that now do, have experienced numerous changes in recent years. Similarly, technologist occupations have only recently been moved into a community college setting and it is difficult to predict future educational developments.

For example, the length of the formal period of training for these occupations is unlikely to remain constant and the Board was told that in the United States technologists are trained in the universities. Thirdly, we question whether it is appropriate to distinguish between university and community college educations and then not distinguish between distinct levels of university training. Can it not be said that the former distinction is no more significant than the difference between a dietitian's and a psychologist's educational backgrounds for instance? Moreover, many of the witnesses on behalf of AAHP consider nurses to be health professionals and yet admitted that a nurse's training is not confined to the universities. We therefore find, that in the circumstances of this case, the differences in educational training should not be considered a major or decisive factor.

17. As a result, to this point, we have not found a clear line which, once crossed, separates the two groups proposed by AAHP for collective bargaining purposes. But while general claims of professionalism do not, in our opinion, support two bargaining units, counsel to AAHP and many of its witnesses stressed the fact that the occupations sought to be represented by AAHP have direct contact with the patient; are treatment oriented; belong to the health care team; and exercise independent judgment. In effect these arguments really attempt to tailor the concept of a professional occupation to the health care industry. At the same time they get away from the qualifications of an employee and focus more on what the employee does. However after careful consideration we have concluded that these considerations neither alone nor collectively, provide a sufficiently clear line of demarcation.

The pharmacist, the dietitian, and the medical record librarian do not have direct contact with the patient in the sense that they are treating someone, whereas, the respiratory technologist does have direct patient contact and does engage in a treatment activity. Independent judgment is a much more complex problem. Initially, it can be said that the criterion fails to allocate the dietitian, the medical record librarian and the respiratory technologist as the AAHP proposes, in that the first two occupations appear to exercise little discretion and the latter occupation would appear to exercise a great deal. However, these exceptions aside, the other occupations sought to be represented by the AAHP do appear to exercise more discretion in their decision-making than the technologist, but we find it essential to note that the activities of the physiotherapist, the occupational therapist, the speech pathologist and the social worker are still very much subject to the ultimate responsibility of the doctor who monitors their treatment and occur in areas where isolated mistakes will, generally speaking, have less traumatic consequences.

The last factor – being a member of the “health care team” – is really a combination of elements. It embraces continuous dialogue with doctors; a treatment perspective; functional interdependence with other direct patient contact occupations; and an evolving health care delivery system. It was established that physiotherapists, occupational therapists, social workers, and speech pathologists dialogue between themselves and doctors. It was also es-

established that save for the working relationship between physiotherapists and respiratory technologists, they have very little direct contact with the technologists. We also accept that the dialogue they have with doctors is more in the nature of a consultation. But be this as it is, it cannot be said that they do not depend upon the services of the x-ray and laboratory technologist in that the information provided by the latter occupations is essential to the effective treatment of patients. In fact, from this perspective all the occupations are functionally interdependent within the meaning of this Board's jurisprudence. Secondly, it was established that technologists do, to a significant extent, consult with the specialized doctors who monitor their activities and that therefore the differences in this respect are not as dramatic as some might suspect. Stated another way, this Board is not prepared to put a premium on consultation with particular doctors. As well, when x-ray technologists are functioning in the operating room we find it difficult not to describe their relationship with an orthopaedic surgeon as team work. Thirdly, the health care team concept is still an evolving medical science concept and insufficiently precise to base a labour relations system upon, as the following quotation, somewhat facetiously demonstrates:

"Physicians are simply not being used in the way they used to be. The "physician per population" ratios are the equivalent, at the statistics level, of the celebrated "physician – patient relationship". But what is clear is that the relationship is changing, to be replaced by the model of the health care team. This new social organization includes nurse, physiotherapist, diagnostician, surgeon, lab technician, social worker, psychologist, inhalation therapist, prosthetic technician, electronic data processing specialist, and with the looming development of organ and mechanical transplants, engineer and mechanic".

(See Edward Gross, *When Occupations Meet: Professions in Trouble*, p. 56, Minneapolis, University of Minnesota (1967).

18. We now wish to examine the term paramedical. The term is worth considering because it is a term by which many appear to allocate occupations in this field – for example, Dr. Aldis' document – and secondly, because we think it does provide the most relevant common denominator. Eliot Freidson, a student of occupation structures in the health science discipline and a respected commentator, has reviewed the meaning of the term in what we think to be a very perceptive manner. (Friedson, *Profession of Medicine* (1970) at pp 48 and 49). He writes:

"The term "paramedical" refers to occupations organized around the work of healing which are ultimately controlled by physicians. Physician control is manifested in a number of ways. First, much of the technical knowledge learned by paramedical workers during their training and used in their work tends to be discovered or enlarged upon or at the very least approved of by physicians. Second, the tasks performed by paramedical workers tend to assist rather than replace the focal tasks of diagnosis and treatment. Third, paramedical workers tend to be subordinate, in that their work tends to be performed at the request or "order" of, and is often supervised by physicians. Finally, the prestige assigned to paramedical occupations by the general public tends to be less than that to physicians.

These characteristics are such that the paramedical occupations may be distinguished from established professions by their relative lack of autonomy, responsibility, authority, and prestige. However, the fact that they are by definition organized around an established profession and, in varying degrees, partake of some but not all of the elements of professionalism, allows us to distinguish them from many other occupations, and, indeed, to argue that they represent a sociologically distinct form of occupational organization".

Friedson then goes on to elaborate this one dominant characteristic that all such paramedical occupations have in common – subordination to the physician (p. 76):

"These paramedical occupations, of which nursing is perhaps the most prominent example, are clearly in a markedly different position than is medicine, for while it is legitimate for them to take orders from and be evaluated by physicians, it is not legitimate for them to give orders to and to evaluate physicians. Without such reciprocity we can hardly consider them the equals of physicians.

And without the autonomy of physicians we can hardly believe it to be useful for them to be classified as the same type of occupation as the physician. They are specifically and generally occupations organized around a profession-paraprofessional occupations. This in itself makes a distinct species of occupation, particularly when people in such an occupation, given their proximity to a profession, are encouraged to take on professional attributes and to claim to be a profession. But whatever the claim, they do not stand in the same structural position as the profession on which they model themselves.

It might be noted that paraprofessional occupations usually seek professional status by creating many of the same institutions as those which possess professional status. They develop a formal standard curriculum of training, hopefully at a university. They create or find abstract theory to teach recruits. They write codes of ethics. They are prone to seek support for licensing or registration so as to be able to exercise some control over who is allowed to do their work. But what they persistently fail to attain is full autonomy in formulating their training and licensing standards and in actually performing their work. Their autonomy is only partial, being second-hand and limited by a dominant profession. This is the irreducible criterion which keeps such occupations paraprofessions in spite of their success at attaining many of the institutional attributes of professions. And the discriminatory power of full autonomy belies the value of using instead such institutional arrangements as training and licensing. That such arrangements are useful conditions for the development of an autonomous occupation is certain; that they are necessary conditions is moot; that they are sufficient conditions is plainly false".

19. We think Friedson's observations capture some of the most salient characteristics shared by the occupations affected by this application. The evidence clearly demonstrates that all the occupations are organized around the medical profession, and despite the ethical

NOTICE TO SUBSCRIBERS TO OLRB REPORTS

Erratum - Stratford General Hospital,
[1976] OLRB Rep. Sept. 459 at p. 503

It has come to the attention of the editor that the following lines were omitted from the reported decision in the above-noted case:-(At page 503 of the report, paragraph 22, third line following the words "...on October 7, 1975, the")

"terminal date fixed for this application and the date which the Board determines under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. The Board is further satisfied that any dispute as to the composition of the bargaining unit cannot affect the applicant's right to certification. Therefore pursuant to section 6(1)(a), the Registrar is directed to issue a certificate to OPSEU with respect to "all paramedical personnel of the respondent at Stratford who are not covered by subsisting collective agreements save and except: Chief Technologist, Assistant Chief Technologist, Charge Technologists and those above such rank, Chief Admitting Officer, Director of Dietitians, Assistant Director of Dietitians, Therapeutic Dietitians, Pharmacist, Chefs, Director of Medical Records, Assistant Director of Medical Records, students employed during the school vacation period, Physicians and persons regularly employed for not more than twenty-four hours per week."

The bargaining unit described in this interim certificate is of course subject to application of section 1(3)(b) with respect to those occupations mentioned in paragraph 7: namely the pharmacist, charge technologist, therapeutic dietitians, assistant director of medical records, assistant chief (or head) technologist. In other words all of these occupations are in the bargaining unit unless section 1(3)(b) applies.

For the purposes of clarity, paramedical personnel includes"

stance taken by some of the witnesses, we are satisfied that all the occupations are subordinate to that profession. They perform their work at the request of a doctor and the work to a greater or lesser extent is monitored by a doctor. In fact, the similar regulatory treatment proposed for each of the occupations by the *Committee on the Healing Arts* suggests that Committee shared our opinion with respect to these common characteristics. The Board is also satisfied that all occupations are integrally related to the treatment process and while there may not be significant direct contact between all the occupations in the two groupings proposed by AAHP, all of the occupations sought to be represented by AAHP rely upon information and analysis provided by many of the other occupations and must be fully familiar with the significance of their activities. Therefore, in this sense there exists a functional interdependence between the activities of the two groups of occupations.

These common characteristics aside, the Board's aversion to fragmentation or preference for a more comprehensive bargaining unit cannot be ignored. Even when the Board has found that two competing applications propose appropriate bargaining units, it has exercised a discretion in favour of the more comprehensive bargaining unit in finding "the" appropriate bargaining unit for the purposes of section 6(1). (See *Parnell Foods Ltd.* (1969) OLRB Report, April 38). Thus even if the units proposed by AAHP were considered appropriate, the Board could exercise a discretion in favour of the more comprehensive bargaining unit proposed by OPSEU. Surely, where there are competing applications the Board can be more concerned with the ideal characteristics of collective bargaining structures in that whatever the decision, employees will not be denied access to the collective bargaining process. However, in the case at hand we have not found that we are confronted by two otherwise appropriate bargaining units but rather we view the fragmentation proposed by AAHP as another indication of inappropriateness. (See *Corporation of the Township of Markham* (1969) OLRB Report, August 592).

Finally, we note that the respondent has administered the terms and conditions of employment of all occupations, aside from actual salary levels, on a common basis. There is therefore no distinction that can be relied upon on this basis.

20. Having reviewed all of these characteristics in light of the principles traditionally applied by the Board, we therefore come to the conclusion that the bargaining unit proposed by OPSEU and, to a greater or lesser extent, endorsed by the respondent, is the appropriate bargaining unit for the purposes of collective bargaining, subject of course, to the differences between the parties with respect to the application of section 1(3)(b), and as a result of this decision the AAHP application must be dismissed for lack of membership support in the appropriate bargaining unit.

21. OPSEU requested that the Board issue an interim certificate in that the outstanding bargaining unit determination cannot affect its right to certification and the respondent did not contest this request. It is therefore granted.

22. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on October 7, 1975, the Occupational Therapists, Speech Therapists, Physiotherapists, Registered Technologists/Pathology, Non-registered Technologists, Radiological Technologists – Radiography, Radiological Technologists – Nuclear Medicine, Respiratory Technologists – registered, Social Workers, Medical

Records Librarian, Psychometrists, Pharmacists, and Psychologists. However, this definition is also subject to the application of section 1(3)(b) to the occupations described in paragraph 7.

0634-76-U Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 172, Room 202, 25 Cecil St. Toronto, Ont. M5T 1N1, (Complainant), v. **A.N. Shaw Restoration Ltd.**, (Respondent).

Interference with Trade Union – Collective Agreement – S.56 – Whether a violation for employer to insist on a clause in collective agreement preventing union from disciplining employees who crossed picket lines during strike that accompanied negotiations.

BEFORE: Donald D. Carter, Chairman, and Board Members J.D. Bell and E. Boyer.

APPEARANCES: *Joseph Goodwin for the complainant; W.G. Phelps for the respondent.*

DECISION OF THE BOARD: September 29, 1976

1. This is a complaint filed under section 79 of the *Labour Relations Act* alleging a contravention of section 56 of the Act.

2. The name "A.N. Shaw Restoration Ltd., 21 Bertrand Ave., Scarborough, Ont. M1L 2P3" appearing in the style of cause of this complaint as the name of the respondent is amended to read: "A.N. Shaw Restoration Ltd.".

3. The subject of this complaint is the respondent's insistence that the collective agreement between it and the complainant contain a "no-reprisal" clause, preventing the complainant from disciplining its members for their conduct during the strike that accompanied the negotiations for that agreement. The evidence relating to the negotiations that took place between the complainant and the respondent is not entirely clear. It was established, however, that, during the course of negotiations, an exchange of correspondence occurred between the parties in late June, commencing with a letter from the respondent, dated June 21, 1976. The letter was in effect an offer, a term of which was the following provision:

"No employee will be subject to any victimization, discrimination, revenge or financial or other penalty of any kind whatever at any time by either the Employer or the Union as a result of his working or refusing to work, or crossing or refusing to cross any picket line during this current strike."

4. The complainant's reply, dated June 22, accepted all but this term of the respondent's offer, objecting to it on the basis that it contravened section 56 of the *Labour Relations Act*. The complainant, however, did indicate that a modified no-reprisal clause,

deleting "financial or other penalty of any kind whatever at any time", would be acceptable to it. The respondent replied by letter on the same day, proposing a differently worded no-reprisal clause and renewing the other terms of its earlier proposal. The altered no-reprisal clause contained the following wording:

"No employee will be subject to any victimization, discrimination, revent or financial or other penalty of any kind whatsoever at any time by either the Employer or the Union as the result of his working or refusing to work, or crossing or refusing to cross any picket line during this current strike subject to this clause being within the law under Article 56 of the Labour Relations Act."

5. The events that followed this letter are difficult to characterize. It would appear that the strike ended immediately following the exchange of correspondence just described. On July 22, 1976, Mr. Joe Goodwin, business manager for the complainant, wrote to the respondent in the following terms:

"Please regard this letter as an adendum [sic] to the existing Contract dated May 1, 1976 thro [sic] April 30, 1968.

That this Local Union agreed to accept the offer made by your company on June 22, 1976, of 50% retro-active pay and Vacation pay, thereby ending the strike which began on 31 May, 1976.

To clarify further, the May 1, 1976 date on the Contract, is therefore the Anniversary date and will be regarded as such in all situations dealing with the Contract and shall in no way be taken to mean that any renumeration [sic] of any kind can be claimed back to that date."

Then, on August 10, a further letter was sent by Goodwin, stating:

"Following our conversation of yesterday, please regard this as an acceptance of your offer, contained in a letter dated June 22, 1976, that all five of the remaining Articles were accepted except for the amendment which was unacceptable."

The respondent, on August 23, replied in the following terms:

"Please be advised, that prior to your letters dated July 22nd. 1976 and August 10th. 1976, we already had a settlement. It is therefore not open to you to unilaterally amend that settlement.

May I remind you that you could not accept our offer to you dated June 21st. 1976 and signed by my colleague Peter R. Ely. As a result of further conversations among yourself, Peter R. Ely and Daniel P. Owen, you agreed to a settlement based on the rephrasing of the "Discrimination Clause", as set out in our letter to you dated June 22nd. 1976 and signed by Mr. Daniel P. Owen.

Obvious evidence of this is, that the men went back to work upon you receiving that letter.”

6. From these facts, it is unclear to us as to whether the complainant and the respondent have reached a firm agreement, subject to the no-reprisal clause being found legal, or whether there is agreement on all issues other than the no-reprisal clause. In any event, it does not appear necessary to choose between these two conclusions, since the issue here is whether the no-reprisal clause amounted to an unlawful interference in the internal affairs of the complainant. If our answer to this question is in the affirmative, then the respondent's insistence on that clause amounts to a contravention of the Act, regardless of whether it was agreed to by the complainant. The fact that the clause may not have been accepted by the complainant does not make the employer's insistence on its inclusion during bargaining any less illegal. The insistence during bargaining upon a provision that, if accepted, would give rise to an illegality amounts to a breach of the duty to bargain in good faith. See *Otis Elevator Company Ltd. v. International Union of Elevator Constructors, Local No. 83*, (1973), 73 CLLC, ¶14,166 (B.C.C.A.). On the other hand, if the clause has been accepted by the complainant, the essence of the wrong would be the actual interference in the internal affairs of the complainant through the contractual operation of the provision, rather than the breach of the duty to bargain in good faith. The parties themselves, moreover, indicated that the Board's decision on the legality of the no-reprisal clause would settle the dispute regardless of how it was characterized.

7. The legality of this no-reprisal clause depends upon the breadth of the prohibition contained in section 56 of the Act. That section reads:

56. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

Although this prohibition is qualified to allow for legitimate expression of views by employers, this qualification does not appear to extend to the conduct being questioned in this case. It is difficult to construe the respondent's insistence upon a no-reprisal clause as being merely an expression of a point of view. Rather, this conduct appears to be an integral part of the approach taken by the respondent at the bargaining table, amounting to a condition for the settlement of the dispute between the parties. The question, then, is whether, by adopting this bargaining stance, the respondent “interfere[d] with the formation, selection or administration of a trade union or the representation of employees by employees by a trade union...”.

8. The existence of a no-reprisal clause in the collective agreement would undoubtedly influence the conduct of internal union affairs in this case. The complainant frankly stated that it wished to discipline those of its members who were employed by the respondent for working during the strike. The respondent was equally candid in admitting that it had promised protection to these employees against any reprisals after the strike was settled. If the no-reprisal clause were held to be legal, its existence would affect the complainant's

power to discipline these three members. Would this result, however, amount to an “interference” as contemplated by section 56?

9. Section 56, in our opinion, cannot be construed as creating a violation on every occasion where a collective agreement, or proposed collective agreement, may conflict with the conduct of internal union affairs. In fact, there is good authority for the proposition that, in certain circumstances, the collective agreement takes precedence over the internal constitutional arrangements of a trade union. See *Oranda Engines Ltd.* (1958), 8 L.A.C. 116 (Laskin); *Leader Masonry and Forming Ltd.*, [1964] OLRB Rep. 156. It does not follow from these cases, however, that any collective agreement provision is justified, regardless of the degree to which it affects the conduct of union affairs. It is possible to contemplate certain contractual provisions, such as one dictating the composition of a union’s executive, that would effectively undermine the independence of the bargaining agent so as to constitute interference as contemplated by section 56. The distinction between merely affecting internal union affairs appears to be one of degree. Some attempt, therefore, must be made to measure the impact of this kind of employer conduct upon the union, the question being whether the conduct of the employer affects the internal affairs of the union to such an extent as to threaten the existence of the union as a viable bargaining agent.

10. In making a determination as to whether employer conduct does threaten the existence of the union as a viable bargaining agent, the consequences of the conduct cannot be considered in isolation but, rather, must be viewed in the context of the collective bargaining process. Collective bargaining, by its very nature, puts the parties against each other in an economic struggle. Either party runs the risk of being damaged in this struggle by having to accept contractual terms that it may regard as unpalatable. This kind of damage, however, is part of the wear and tear of collective bargaining and its infliction cannot be regarded as illegal.

11. The no-reprisal clause that the respondent insists upon in this case is, in our opinion, just part of the normal wear and tear of collective bargaining. Undoubtedly, this restriction upon the power to discipline its members is unpalatable to the complainant, since it may affect its credibility with those members who did engage in the strike. On the other hand, it would appear that the respondent, although obviously attempting to maintain its credibility with the three employees that continued to work for it during the strike, was not attempting to undermine the existence of the union as a viable bargaining agent. The conduct of the negotiations clearly indicated the respondent’s intention to continue to recognize the complainant as bargaining agent for its employees. Moreover, it should be pointed out that protection for the three employees also could have been achieved through the negotiated alteration of the union security provision, a more drastic, but nevertheless legal, approach.

12. A final consideration, and an overriding one, is the fact that no-reprisal clauses are not an uncommon feature of collective bargaining. Collective bargaining disputes can be long and bitter and, to prevent their continuation after agreement is reached, the parties may often agree to let bygones be bygones. This kind of agreement usually cuts both ways – protecting employees from employer discipline and also protecting them from union discipline. The two-edged nature of the no-reprisal agreement, however, does not mean that it will always cut equally. In this case, for example, it is clear that its primary, and perhaps only, effect would be to protect the employees from union discipline. Nevertheless, this no-

reprisal clause still serves a legitimate collective bargaining purpose by forcing the parties to put the dispute behind them.

13. Our conclusion is that the no-reprisal clause in the circumstances of this case does not undermine the existence of the complainant as a viable bargaining agent. This clause, although perhaps affecting the conduct of internal union affairs, cannot be considered as the kind of interference contemplated by section 56. It is our determination, therefore, that the clause in question does not contravene section 56 of the *Labour Relations Act*.

14. The complaint is dismissed.

0575-76-U Reginald Stanley Harcourt, (Complainant), v. The Canadian Union of Public Employees, Local 1749 and The Board of Education for the Borough of York, (Respondents).

Duty of Fair Representation – Discharge for Union Activity – S. 60 – Whether a violation to negotiate a separate rate of increase for one member of bargaining unit one half rate negotiated for all other members.

79(4a)–Effect of employer’s reasons for reclassification of employee being based on data found to be incorrect.

BEFORE: M. Picher, Vice-Chairman, and Board Members H.J.F. Ade and D.B. Archer.

APPEARANCES: *R.S. Harcourt and M.G. Horan for the complainant; J. H. Bird for the union; B.R. Baldwin for the employer.*

DECISION OF THE BOARD: September 27, 1976

1. This is an application under section 79 of the Act. The complainant alleges that the respondent employer has dealt with him contrary to section 58 of the Act and that the respondent union has breached the duty that it owes to him under section 60.

2. Although the Board heard lengthy oral evidence and a substantial number of exhibits were filed, the material facts and the issues arising from them can be briefly stated.

3. The complainant is and at all material times was employed by the respondent Board of Education for the Borough of North York as an “Intermediate Draftsman”.

4. He was the founding president of the respondent, Local Union 1749, and was a member of the negotiating committee that concluded a first collective agreement with the respondent employer in November of 1974. As well, he was a member of the committee that negotiated the renewal of that agreement that was effected in March of 1976.

5. Article 22 of the 1974 agreement is, in part, as follows:

“During the term of this Agreement, the parties agree to meet, examine and determine the appropriate classification for each employee.”

The evidence is that the process of reclassification is nominally carried out through the “Labour Management Committee” provided in Article 20 of the collective agreement and consisting of representatives of both the union and management. It is common ground that, in fact, the Committee was at best a conduit and that the ultimate decision on reclassification was the employer’s.

6. In the spring of 1975, Mr. Harcourt applied for a reclassification, asking to be made a Senior Draftsman with a commensurate increase in salary. His application was one of seventeen such applications brought by various employees, one of whom was also a draftsman, named Cheung. Mr. Cheung was junior to Mr. Harcourt and the latter assisted him in making his application. In the result, Mr. Cheung was reclassified upwards from a position described by the employer as Junior Draftsman, Grade V to Intermediate Draftsman, Grade VI. The complainant’s application was denied. Only three of the seventeen applications were successful.

7. The Board heard the evidence of Mr. I. W. Baker, Personnel Officer of the respondent employer that at the time of the seventeen applications for reclassification he did individual studies for each applicant with respect to the classification and wages of apparently comparable persons employed by the Boards of Education of the four other boroughs of Metropolitan Toronto. He prepared a memorandum dated April 1, 1975 which reflects Mr. Harcourt’s wages as being substantially in excess of those of draftsmen employed in all categories by the Boards of Education of those boroughs. Mr. Baker noted in his memo that the complainant’s position when compared to those in other Metro Boards “is probably over graded”. Mr. James, the Superintendent of Business for the employer, later modified that sentence by deleting the word “probably”. It appears that he also added the following notation immediately below Mr. Baker’s recommendation for no change in classification: “Proper placement should be at grade VI of Schedule I.”

At that time Mr. Harcourt’s annual salary was \$16,232. A person classified within Grade VI of Schedule I with his experience would then be at a salary of no more than \$13,199, according to Appendix “A” of the then existing collective agreement. That amount coincides with the salaries indicated for middle range draftsmen in other Boards of Education appearing in Mr. Baker’s memorandum.

8. Mr. Jack Bird is the business agent of the Union and worked with the complainant in union affairs from the time the local was organized. He testified that at the time the complainant requested reclassification he had gathered statistics indicating rates of salary for draftsmen across Canada, including Toronto, and that he had advised Mr. Harcourt of these statistics. He testified that the union executive then formed the opinion that the complainant did not have a good case for parity with a draftsman at the senior end of the scale with the Board of Education of the City of Toronto. Mr. Bird stated that he did not normally provide union members the kind of comparative figures that he gave Mr. Harcourt, and that he felt that the statistics were an indication that Mr. Harcourt could not expect to be reclassified upwards.

9. The complainant's request for upgrading was denied, and so matters stood until the employer and union entered into negotiations for the renewal of the collective agreement. Their first joint meeting was held on December 18, 1975. In preparation for that meeting the employer had prepared a written submission dated November 28, 1975 which stated the position of management with respect to each article of the collective agreement. Under Appendix "A", which is the salary grid, the employer made the following submission:

"Delete Intermediate Draftsman and include in Grade VI and "red star" incumbent."

The "incumbent" is Mr. Harcourt.

10. From that time until the last hours of negotiations, the employer held steadfastly to its view that the complainant should be "red starred" or "red circled", meaning that his salary should be frozen until such time as it was caught up to by the salary for the category on the grid described as "Grade VI". It is to be noted that in the eyes of the employer, the only other draftsman in their employ, Mr. Cheung, was within the salary scale of Grade VI, as indicated in paragraph VI, *supra*.

11. Mr. Harcourt testified that when he understood the meaning of the employer's position he contacted Mr. Bird who assured him that it was merely a bargaining ploy, and that the union wouldn't allow him to be red starred.

12. Three negotiation meetings took place. At the first meeting, on December 18, 1975, the parties merely ran through the outlines of their position and the red starring of the complainant was raised by him only briefly to state that the employer would have a fight on its hands with respect to this issue.

At a second meeting only non-monetary matters were dealt with. At the third and final meeting between the negotiating teams, on March 1, 1976, according to the unchallenged testimony of Mr. Bird by approximately 4:50 p.m. all monetary matters were settled between the parties except for the employer's proposal to red star the complainant. At that point an impasse was reached on that issue. After some two hours of discussion, the employer moved off its original position and proposed that Mr. Harcourt be given an increase of one half of the amount of the increase that had been agreed upon for employees in the category of Grade VI. When the union's committee caucussed on that proposal the complainant was adamant that the union should settle for nothing less than the same rate of increase for himself as for all employees. When it became evident that the other members of the negotiating team were prepared to accept a compromise that would give Mr. Harcourt less than that, he withdrew from the committee and declined to return to the bargaining table. It is clear that this was a difficult time for Mr. Harcourt. His feeling then was, in his own words that, "I was having my heart ripped out".

13. The union's negotiating team returned to the bargaining table with a counter-proposal demanding that the complainant neither be red starred or frozen entirely, nor given one half the increase awarded for employees in Grade VI, but rather that he be given an increase based upon his present salary, and not upon any salary in Group VI, but at a rate of increase being half of that applied to all other employees. This proposal was agreed to by

the employer's negotiating team sometime after 9:00 p.m. The memorandum of agreement executed by the parties contained the following provision respecting the complainant:

"That the classification of Intermediate Draftsman be Grade VI; that the classification Intermediate Draftsman, Appendix 'A', be deleted, and the employee who held this classification in 1975 receive an adjustment in 1976 equal to 6% of his 1975 salary rate and in subsequent years receives an adjustment equal to 50% of any negotiated increase applicable to the maximum of Grade VI until such time as the salaries coincide."

14. On March 8, 1976 a meeting of the local, at which Mr. Harcourt presided, was held to consider ratification of the collective agreement. It is common ground that the question of his special treatment under the proposed agreement was discussed at that meeting and that prior to the meeting the complainant as president had circulated a memorandum to all members commenting on the agreement generally, referring specifically to what he described as the "discriminatory clause" against himself and stating his opposition to ratification in the light of that clause.

While the evidence of Mr. Bird and that of Mr. Harcourt differ slightly with respect to exact figures it is agreed that the meeting of the union local was well attended and that following the discussion upwards of 80% of the membership present voted by secret ballot in favour of ratification. The agreement was thus made effective between the parties.

15. The evidence before the Board is clear that Mr. Harcourt vigorously pursued his cause within the union even after the ratification vote. In the months of March and April he wrote three letters to the National President of the respondent union in an effort to launch a formal grievance within the union at the national level. Letters of reply filed by the complainant indicate that the National Union viewed this as a matter to be dealt with at the local level.

16. The Board is satisfied that the totality of the evidence does not support the view of the complainant that he was dealt with in a manner that is arbitrary, discriminatory, or in bad faith by the union or any of its officers or members.

The case put forth by the complainant comes close to an assertion that the negotiation of anything less than an equal salary increase for all members in the bargaining unit amounts to discrimination against those who receive less and constitutes bad faith in breach of the requirements of section 60.

This Board has in the past recognized that in an effort to obtain the maximum benefits for its membership a union may be forced to make critical choices and trade-offs that may affect its membership unequally, and that a union may indeed be required to go so far as to abandon the interests of certain individual members. (See *Ford Motor Co.* [1973] O.L.R.B. Rep. Oct. 519)

Such trade-offs are the everyday stuff of collective bargaining and form a large part of the bargaining tactics of unions and management alike. There is nothing in section 60 to require the duty of sweeping egalitarianism suggested by the complainant. When a un-

ion has exerted equal effort on behalf of all of its members it is not chargeable with a breach of the duty of fair representation merely because equal effort has not borne equal fruit. And while it may be that the circumstances of some individuals or minorities may require a union to exert more vigorous efforts on their behalf than on behalf of others, it does not follow that the general membership acts in bad faith merely because it declines to go to the brink of strike and beyond for the sake of the individual or minority. The Act demands good faith representation, not heroism or self-sacrifice.

17. The Board is aware that Mr. Harcourt is the victim of a bitter circumstance. He finds himself segregated from the 125 or so other employees in his bargaining unit. They have all received 12% increases and he is limited to 6%, with a prospect of continued reduction in the future. And this after he has strived to advance the interest of his co-workers as founding president of the local.

The tone of his correspondence with the members of his local as well as with the National President and his demeanour before the Board indicate that his personal handling of his very sensitive plight was at all times as gentle and tempered as it was resolute. The Board knows the poignancy of the blow, both financial and emotional, that he has suffered.

18. The Board finds nothing in the evidence, however, to establish that the union acted in any manner that was arbitrary, discriminatory or in bad faith in representing his interest. On the contrary, the evidence before us shows that the respondent union adopted a position favorable to the complainant from the outset of negotiations until their conclusion. The employer's proposal respecting the complainant was the last item on the bargaining table and remained the subject of an impasse that lasted some four or five hours. As indicated in paragraphs 12 and 13 above, the union's efforts at that time saved the complainant from the absolute red starring originally demanded by the employer and yielded two successive compromises in an effort to obtain some relief for him.

19. The complainant adduced further evidence of the union processing on his behalf, chiefly through its business agent, a grievance apparently unrelated to the above events. The complainant's position is that the union failed to carry the grievance through to arbitration. He states that he was unsatisfied with the resolution reached between the union and the employer whereby a letter of a disciplinary nature would be removed from his record after a year. The position of the respondent union was that it received no indication from the complainant that he wished the grievance pursued any further. While the evidence surrounding these events was sketchy at best the Board is satisfied that they indicate at most a breakdown in communication between Mr. Harcourt and Mr. Bird and not a breach of the union's duty of fair representation.

20. We turn now to the complaint as against the respondent employer. The allegation is that the employer's attempt to red star or red circle Mr. Harcourt and its partial success in doing so was motivated by considerations other than sound management policy. Specifically, by pleading section 58 of the Act, Mr. Harcourt alleges that this employer sought to discourage his activities as a member and officer of the union and to prevent him from enjoying generally his rights under The Ontario Labour Relations Act.

21. Upon the filing of such a complaint the proceedings of the Board are subject to the terms of section 79(4a) of the Act which is as follows:

“79(4a) On an inquiry by the Board into a complaint under subsection 4 that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers’ organization did not act contrary to this Act lies upon the employer or employers’ organization”.

22. In the instant case, on the basis of all of the evidence before it, the Board is satisfied that the respondent employer has discharged its burden to show that its motives and deeds were untainted by anti-union *animus* that would amount to a breach of The Labour Relations Act.

23. We accept the evidence of Mr. Baker to the effect that the employer’s course of action respecting Mr. Harcourt was triggered by his own application for reclassification in the early part of 1975. At that time the employer discovered that Mr. Harcourt appeared to be overclassified and overpaid when compared to draftsmen employed by other Boards of Education in Metropolitan Toronto. The application was then denied and the motive for that denial became the motive for the respondent employer’s position with respect to the complainant in the collective bargaining that took place several months later. By applying for reclassification Mr. Harcourt drew attention to himself and his application backfired.

24. On cross-examination of Mr. Bird, counsel for the complainant succeeded in raising some doubt as to the accuracy of the salary figures for draftsmen employed at other Boards of Education as reflected in the memorandum dated April 1, 1975 and prepared by Mr. Baker to deal with Mr. Harcourt’s application for reclassification. Mr. Bird acknowledged that the figures representing the salaries of draftsmen employed by the Toronto Board of Education were incorrect and that the correct amounts were some \$2,000 higher. He did so by referring to the collective agreement effective in that Board of Education from January 1, 1975 presented to him by counsel for the complainant, an agreement in whose negotiation he had been involved as a union representative.

25. The Board has had some considerable concern over this aspect of the evidence. In the instant case the respondent employer has sought to discharge its burden by proving that its decision to red star the complainant was motivated by the realities of the market. To the extent that its view of that market was based on an inaccurate self-serving document whose contents were never made known to the complainant nor the union the Board might be given to doubt the sincerity of that explanation. When the burden of proof is upon the employer and at the end of the day the Board is left in doubt, that doubt must be resolved in favour of the party that does not bear the burden of proof – in this instance the complainant. (*The Barrie Examiner* [1975] OLRB Rep. Oct. 745 at 748).

26. However, that is not the situation in the instant case, for three reasons.

Firstly, the figures in Mr. Baker’s memorandum went unchallenged in so far as they relate to the salary scales for draftsmen in the other three boroughs compared. Mr. Harcourt was paid \$2,000 more than the highest paid Board of Education draftsman in any of the other three boroughs.

Secondly, close scrutiny of the evidence suggests that the error respecting the Toronto Board of Education may have been the result of a *bona fide* error by Mr. Baker. The salary range for that Board appearing in his memorandum does, in fact, appear in the collective agreement effective in that Board of Education in 1975, but it represents the 10 month salary range, not the 12 month range. In light of Mr. Baker's testimony that he obtained his figures by means of telephone calls to his counterparts at the other Boards of Education, it is not unreasonable to suppose that the person supplying the figures did so from the wrong grid, especially since the two grids are in immediate sequence in Appendix "C" to that collective agreement. The Board made that very mistake when it first sought to check the figures in the April 1, 1975 memo against those in the collective agreement for Toronto filed by counsel for the complainant.

Thirdly, Mr. Baker's memorandum does not stand alone as evidence before this Board of the reasonableness and, by extension, the genuineness of the employer's view that Mr. Harcourt was overpaid. In the instant case the independent evidence of Mr. Bird has sufficient corroborative value to persuade us that the respondent employer's position was something more than a transparent guise to suppress the complainant's union activity. The Board accepts the evidence of Mr. Bird that at the time that Mr. Harcourt made his application for reclassification he showed Mr. Harcourt statistics respecting comparative salaries for draftsmen both across Canada and in the North York Board of Education to support his own view that Mr. Harcourt should not expect to succeed in his application. In our view, that evidence supports the respondent employer's case and tends to overcome any doubt raised by the partial inaccuracy of Mr. Baker's memorandum.

27. In a complaint under section 58 it is not enough for the employer to merely satisfy the Board that sound management considerations were part of its reasoning in dealing with an employee as they did. The employer must also satisfy the Board that a desire to prevent or discourage the employee from exercising his rights under The Labour Relations Act formed no part of its motive or reasoning (see *The Canadian H. W. Gossard Co. Limited* [1967] OLRB Rep. March 994). We are satisfied that that is so in the instant case.

28. In proceedings under section 79(4a) of the Act when an employer has adduced evidence that, standing by itself, would tend to satisfy the Board that the employer did nothing to breach the Act the complainant may bear a tactical burden to rebut the employer's case. He or she may succeed in casting doubt upon the employer's case by adducing evidence of a contemporaneous anti-union campaign by the employer or of such other facts as would cause the Board to question the sincerity of the employer's explanation. A failure to do so might well result in the dismissal of the complaint. If the employer's explanation for its dealing with the employee stands effectively unchallenged its overall burden is, to that extent, discharged.

That is close to what has happened in the instant case. The complainant has adduced no evidence before us that would in any way indicate any anti-union motivation in the employer. He has sought to rely on the bare fact that he was the founding president of the respondent local union. While that may be a substantial consideration in a case where the evidence pointed to a general and concerted anti-union campaign by the employer it bears considerably less evidentiary weight where, as here, there is no hint of any such campaign or motive.

The complainant's presidency of the local union does not insulate him from being dealt with in good faith by management, the same as any employee.

29. It is not the place of this Board to determine whether, in fact, the complainant was or was not overclassified or overpaid and whether the red starring was therefore justified. Our concern is with the motive of the employer, quite apart from whether that motive or the action taken in consequence of it appear reasonable to us. While patent unreasonableness might raise doubt in the Board's mind as to the genuineness of the reason given for the employer's action (see *Zehr's Markets Ltd.* [1971] OLRB Rep. 39) we find nothing in the instant case to cause the Board to adopt that approach. The fact that the employer's motive may have been based in part on misinformation does not in our opinion negate the genuineness of that motive in the instant case, nor does it persuade us that there has been a breach of section 58 of the Act. Any injustice that may have resulted from the employer's misconception of Mr. Harcourt's comparative salary position would more properly be the subject of discussion at future bargaining sessions between the parties.

30. The complaints as against both the respondent union and the respondent employer are hereby dismissed.

0257-76-R Canadian Union of Public Employees, (Applicant), v. Greater Windsor Investments Limited, Windsor Nursing Home, (Respondent).

Practice – Whether the Board will consider a request to amend the bargaining unit description after the membership evidence count has been announced at the hearing.

BEFORE: Ian C.A. Springate, Vice-Chairman, and Board Members O. Hodges and Fraser D. Kean.

DECISION OF THE BOARD: September 9, 1976

1. By its decision of June 4, 1976 in this matter the Board, pursuant to section 6(1)(a) of The Labour Relations Act, certified the applicant as bargaining agent for certain employees of the respondent pending final resolution of the bargaining unit. At the hearing the parties, although otherwise in accord as to the appropriate description of the bargaining unit, could not reach agreement as to the status of the person classified by the respondent as "dietary supervisor." The Board, therefore, in its decision appointed Mr. D.A. McNabb, Labour Relations Officer, to meet with the parties and enquire into the duties and responsibilities of the person who holds the position of dietary supervisor.

2. At a meeting called by Mr. McNabb on June 17, 1976 the parties reached agreement that the position of dietary supervisor should be excluded from the bargaining unit.

3. On July 5, 1976 counsel for the respondent wrote to the Board requesting for the first time the exclusion from the bargaining unit of students employed during the school vacation period. By a second letter dated July 14th counsel indicated that he had not made

this request at the hearing only because of his own inadvertence. Mr. S.J. Dowell, a representative of the applicant, did not consent to counsel's request but instead took the position that the matter could be dealt with by the parties during negotiations.

4. In an application for certification the applicant trade union and the respondent employer are each invited in their initial filings with the Board to set out the description of the bargaining unit which it claims to be appropriate for collective bargaining, (see Form I: Application for Certification and Form 9: Reply to Application for Certification.) The parties, however, are not held to their initial proposals and as a general rule they are permitted to amend their proposals up to and even during the hearing (see *Hashman Construction - Division of Tristar Western Ltd.* [1973] OLRB Rep. Dec. 630.) However, once the Board at the hearing has disclosed the number of persons in the bargaining unit as indicated on the schedules filed by the respondent, as well as the membership position of the trade union, the Board's well established practice is not to allow one party to unilaterally alter its proposal for the bargaining unit (see *The Corporation of the Township of Kingston* [1975] OLRB Rep. April 370.) This is done in part to ensure that a party cannot modify its proposed bargaining unit solely to take advantage of the union's membership position (see *Gwell Investments Ltd.* [1971] OLRB Rep. Oct. 675.) However, a second purpose is to ensure that the certification process is not allowed to drag on indefinitely. The Board's procedure is such as to ensure that at the hearing the parties will either reach agreement as to the appropriate bargaining unit (which agreement the Board will usually, though not necessarily, adopt) or at least clearly delineate the differences between them.

5. In the instant case the respondent in its reply did not request the exclusion from the bargaining unit of students employed during the school vacation period. Nor did it make such a request at the hearing. The only issue in dispute which remained after the hearing concerned the status of the dietary supervisor, and that issue was resolved by the parties themselves on June 17, 1976. This being the case, the Board has determined that the facts do not warrant a departure from its policy as stated above, and the Board will not now exclude from the bargaining unit students employed during the school vacation period.

6. Having regard to the above, as well as to the Board's decision of June 4, 1976, the Board finds that all employees of the respondent at its Windsor Nursing Home in the City of Windsor save and except administrator, dietary supervisor, nursing director, social director and persons above those ranks, and registered nurses and persons regularly employed for not more than 24 hours per week constitute a unit of employees of the respondent appropriate for collective bargaining.

7. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on May 17, 1976, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

8. A formal certificate will issue to the applicant.

0362-76.U: Service Employees Union – Local 210 (Affiliated with Service Employees International Union) AFL-CIO-CLC, (Complainant), v. **The Board of Trustees of the Roman Catholic Separate Schools for the City of Windsor**, (Respondent).

Change in Working Conditions – S.70 Whether contracting out full-time summer work formerly always awarded to part-time fall and winter student employees a violation – Effect of bargaining unit of part-time employees not including students employed during summer vacation.

BEFORE: D. H. Kates, Vice-Chairman, and Board Members H. Simon and W. H. Wightman.

APPEARANCES: *T. Wohl and B. Janisse for the complainant; D. I. Wakeley and H. J. Fleming for the respondent.*

DECISION OF THE BOARD: September 9, 1976

1. This is a complaint filed under section 79 of the Act alleging that the respondent employer by contracting out its outside maintenance work of the school premises under its authority without the consent of the complainant violated section 70(1) of the Act. Section 70(1) reads as follows:

Where notice has been given under section 13 or section 45 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employee,

(a) until the Minister has appointed a conciliation officer or a mediator under this Act and,

(i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or

fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board, as the case may be, or

(b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first.

2. The background circumstances precipitating this complaint is without dispute. By decision of the Board dated December 15, 1975 the complainant was certified as the exclusive bargaining agent of employees described in paragraph 2 of its decision:

“Having regard to the agreement of the parties,

the Board further finds that all employees of The Board of Trustees of the Roman Catholic Separate Schools for the City of Windsor, regularly employed for not more than 24 hours per week, save and except foremen, persons above the rank of foreman, office staff, professional teaching staff, teacher aids and persons covered by a subsisting collective agreement, constitute a unit of employees of the respondent appropriate for collective bargaining."

(emphasis added)

3. Following certification a registered letter dated December 22, 1975 was mailed to the respondent's business administrator extending "... formal notice of our desire to bargain collectively ...". At the close of the letter Mr. Janisse on behalf of the complainant advises:

"Proposals in the form of a collective agreement will be forwarded to you as soon as possible."

4. On February 13, 1976, the complainant dispatched to the respondent its draft proposals. Mr. Janisse explained that what he did was merely extrapolate the relevant provisions of the collective agreement between the full time employees represented by the complainant and amend the same to suit the peculiar concerns of members of the bargaining unit described in paragraph 2 herein. The relevant portions of that agreement reads as follows:

ARTICLE 2 – RECOGNITION

2.01 The Board recognizes that the union shall be the sole bargaining agent for all employees of the Board of Trustees of the Roman Catholic Separate Schools for the City of Windsor, save and except foremen, persons above the rank of foremen, office staff, professional teaching staff and persons regularly employed for not more than twenty-four (24) hours per week.

ARTICLE 20 – HOURS OF WORK, OVERTIME AND WORKING CONDITIONS

20.07 The caretaker work load shall be as follows:

- (A) Where a caretaker works and has duties at one (1) school only, the work load shall be ten (10) classrooms and auxiliary areas.
- (C) Where a caretaker works and has duties at three (3) schools or more schools, the work load shall be eight (8) classrooms and auxiliary areas.
- (D) In the future, in the event that any existing classroom, through alterations or renovations, is converted to an auxiliary area, for the purpose of computing the aforementioned work loads such area will be considered a classroom and not auxiliary area.

In like manner, in the event that any auxiliary areas in the future through alterations or renovations, are converted to a classroom, for the purposes of computing the aforementioned work loads such areas will not be considered a classroom but will remain auxiliary areas.

It is further agreed that all former duties of caretakers shall continue except that *no caretaker shall be required to cut grass or trim shrubbery.*

The evidence indicates that Mr. Janisse in preparing his proposals for an agreement, mistakenly, failed to delete the reference proscribing caretakers from performing outside maintenance work.

5. Prior to certification the respondent's practice was to assign its outside maintenance work "to students employed during the school vacation period". The evidence indicates that during the course of the year the respondent employs both university and high school students on a part time basis to discharge inside caretaking duties. During the spring and summer months some of these students are assigned in addition to their normal inside duties the jobs of cutting the grass and trimming the shrubbery. Those students assigned these extra outside maintenance functions to all intents and purposes worked during the school vacation period a regular forty hour week. It is of some significance to note that not all students employed on a part time basis during the school year were necessarily assigned the tasks of performing outside work. Indeed, the evidence shows that those who were given the added work were extended preferential treatment.

6. By letter dated February 27, 1976 the complainant confirmed with the respondent their arrangements for its first negotiation session. At that session on March 18, 1976 the complainant was informed that "students employed during the school vacation period" were not being treated by the respondent as being included in the appropriate bargaining unit certified by the Board. At that time the complainant was also informed that a decision had been made to extend invitations to tender for the performance of the outside maintenance work. Mr. Janisse on the complainant's behalf objected to the respondent's intention of contracting out without its consent the jobs normally performed by the student members of the appropriate bargaining unit. Notwithstanding the complainant's opposition the respondent proceeded to enter into a formal contract for the performance of the work in question. The term of the contract spanned the period between April 2nd and September 30, 1976. The students normally assigned the outside maintenance work continued their regular inside caretaking duties at their regular hours never exceeding twenty-four hours per week.

7. Mr. H. J. Fleming has been employed by the respondent as the supervisor of plants for the past ten years. He is responsible for the hiring and assigning of work to the part time students falling under his authority. Mr. Fleming is a member of the respondent's negotiating committee and as such advised that as a result of the plain language of the Board's certificate and the ensuing proposals for an agreement submitted by the complainant the respondent resolved to contract out its outside maintenance duties. In other words, the respondent employer was convinced that students employed during the school vacation period who worked in excess of 24 hours per week were not included in the bargaining unit. Notwithstanding Mr. Janisse's protestations of March 18, 1976 Mr. Fleming advised that the respondent had resolved to carry on with its decision to invite tenders.

8. Mr. Janisse testified that at the Board's hearing during the certification proceedings the complainant did not request the inclusion of "students employed during the school vacation period" in the appropriate bargaining unit. His assumption was that such students because they were regularly employed for not more than twenty-four hours per week automatically would be represented during the summer months when their work schedule was altered. The parties agreed that the respondent's lists filed in reply to the certification application contained the names of part time students who indeed were employed during the summer in outside maintenance work for a period in excess of 24 hours per week. And, of course, both parties agreed at that hearing that such persons were included in the agreed to bargaining unit described in the Board's certificate.

9. The only issue argued by the parties at the hearing scheduled for this matter was whether the students affected by the respondent's decision to contract out were "employees" represented by the complainant for which the prohibition applied under section 70(1) of the Act. The respondent argued quite persuasively that failure of the Board's certificate to include "students employed during the school vacation period" disqualified the complainant from any status to file the instant grievance. During the summer months these employees are simply outside of the bargaining unit and therefore unaffected by the respondent's decision to contract out its outside maintenance work. Alternatively, the respondent argued that the failure of the complainant to request the inclusion of "students employed during the school vacation period" followed by the ensuing proposal (albeit submitted by mistake) indicating that the caretakers were not interested in performing outside maintenance work raised "an estoppel" precluding further complaints by the complainant.

10. The complainant submits that notwithstanding its failure to request the inclusion of "students employed during the school vacation period" at the certification hearing the employees prejudiced by the respondent's contracting out are members of the bargaining unit in that they are regularly employed for not more than twenty-four hours per week. It follows that the outside maintenance work assigned a number of them during the summer months ought to be treated as a fringe benefit (i.e. in the same manner as over time) which was wrongfully denied them during the prohibited period. In reply to the alternative argument propounded by the respondent, the applicant simply submits that Mr. Janisse had brought his mistake to the attention of the respondent's representatives sufficiently in advance of entering into a contract tying the respondent to any legal obligation. Indeed, the evidence shows that notwithstanding the respondent's decision to proceed with its intention to contract out no invitation to tender was issued until March 23, 1976, five days after Mr. Janisse advised of his mistake. It therefore follows that the respondent proceeded to invite tenders at its peril.

11. The Board is quite satisfied that this dispute could very well have been avoided had the applicant proposed as appropriate the bargaining unit that accorded with our past policy considerations. (See; *The Wilson-Munroe Company Ltd.* case [1973] OLRB Rep. December 647 at p.648). In other words, the rationale underlying the Board's policy of lumping both persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period is particularly designed to overcome the difficulties encountered by the parties to the instant proceedings. It does not follow however that the failure by the applicant to request such inclusions necessarily results in the employees prejudiced by the respondent's actions in not continuing to be included in the appropriate bargaining unit determined by the parties' agreement. The evidence is uncontradicted

that students who were employed for not more than twenty-four hours per week were treated as part time employees by both parties. Indeed, the respondent's lists conforms with the group of employees sought to be organized by the complainant trade union. The Board cannot in the light of this evidence conceive of how these employees once notice to bargain under section 13 of the Act is extended cease to be employed in the bargaining unit once the outside maintenance work commences. In other words, the complainant's argument that the assignment of outside maintenance work ought to be treated as a fringe benefit commends itself having regard particularly to the preferential practices indulged in by the respondent in the past in making these assignments. Moreover, the respondent's suggestion that these students during the school vacation period may very well be a part of the full time bargaining unit simply offends our intellectual sensibilities with respect to the intentions of the parties to that collective agreement. In accordance with the terms of that agreement the prohibition with respect to the performance of outside maintenance would thereby apply to students employed during the school vacation period. In short, the Board having regard to the evidence is quite satisfied that the students employed on a part time basis are employees covered by the Board's certificate during the period when they work in excess of twenty-four hours per week. In doing so, the Board is merely abiding by the parties' agreement submitted before another panel of this Board in the certification application with respect to the description and composition of the appropriate bargaining unit. Had students employed during the school vacation period not been employed as part time employees during the school term then perhaps different considerations would obtain.

12. The Board has considered the question of remedy in this case in context of the respondent's alternative argument. Although we cannot find that a case has been made out in support of the application of an estoppel, the Board is satisfied that the complainant to some extent has been the author of this unfortunate circumstance. The Board notes that the representatives of the complainant appearing at the certification hearing are not neophytes unschooled in Board policy and practices. Although Mr. Janisse's letter to the respondent was admittedly a mistake that was brought to its attention prior to the invitation to tender it nonetheless confirmed their resolve to adhere to a strict interpretation of the Board's certificate. We can perceive that at all material times the question raised herein was "moot" and legitimately an arguable issue until resolved by this Board. The Board has therefore decided that the contract entered into for the performance of the outside maintenance work ought to be allowed to run its course. Upon the expiry thereof, the Board, directs that the cutting of the grass and the trimming of shrubbery be appropriately assigned to employees in the bargaining unit.

0651-76-U Jaroslav Rehak, (Complainant), v. Local 1005, United Steelworkers of America, (Respondent).

Duty of Fair Representation – Whether union may settle a number of grievances in one agreement or deal with each individual's grievance separately.

BEFORE: Rory F. Egan, Alternate Chairman.

APPEARANCES: *Jaroslav Rehak, Nick Hilhorst and Mario Marchesan for the complainant; Robert Rae, William Elliott, Bryan Atkinson and Lennard Dimitry for the respondent; C. G. Riggs, V. P. Harris, D. C. Williams and B. M. Walker for The Steel Company of Canada.*

DECISION OF THE BOARD: September 10, 1976

1. This is a complaint brought by Jaroslav Rehak in which he alleges that he has been dealt with by the respondent contrary to the provisions of section 60 of The Labour Relations Act.
2. The complainant is one of seven employees of The Steel Company of Canada in Hamilton who were discharged by their employer for drinking on company premises and causing extensive damage to company property. All the employees grieved against their discharge. Three of the seven employees were re-hired by the company, but the grievor and three other employees were not re-hired. This disposition of the grievances by the respondent followed discussions of and negotiations concerning the above incident which occurred on March 31, 1975, held between the union and the company. It is the grievor's claim that the settlement was discriminatory and arbitrary on the part of the union, and he requests the Board to direct the union to carry his grievance through to arbitration.
3. The evidence is clear that at a meeting held by the union with the grievors, it was explained to the latter that there were two ways in which the union could approach the company with respect to the grievances. It was pointed out by the union that one method would be to follow the normal grievance procedure of the collective agreement. The grievors were advised that this procedure would lead to considerable delay should arbitration be necessary, and that, of course, there could be no guarantee of success for any of the grievors if this course were to be followed.
4. The union explained that another method of dealing with the problem would be to approach the company in an attempt to negotiate settlement of the grievances while the time limits in the collective agreement were held in abeyance. This course of action, it was explained, would lead to a disposition of the matter with much greater dispatch although again, without any guarantee of success.
5. The grievors, including the complainant, agreed to adopt the negotiation technique through a special committee set up by the union to expedite grievances. There can be no doubt, upon the evidence, that the union thoroughly investigated the incident which led to the discharge of the grievors. They obtained statements from the grievors, although it must be noted that no individual personal interview was held with the complainant, although attempts were made to contact him. The union discussed the evidence as they understood it with the company and, in turn, gave consideration to the evidence upon which

the company relied in support of its action. The union examined the site of the incident and saw the extensive damage that had been done.

6. Having completed its investigation, and after taking into account the company's evidence, the union made the following proposal to the company:

"This is our proposal:

Ken DAVIDSON, John WEBSTER, Wayne BELL

All three of these men have been accused of heavy drinking in the plant on the night of Mar. 31, 1976. They have also been charged with horseplay leading to damage of Company property.

Naturally, we are concerned about the discharge of any employee for any reason. However, we understand the seriousness of these charges. Since our knowledge of the events of the night in question does not differ substantially from that brought forward by the Company we are willing to agree that these three men remain discharged.

Joroslav REHAK

Rehak was not involved in horseplay and did no damage to Company property. He has been accused of heavy drinking and rowdiness.

This man should be rehired immediately into another area of the plant with a three month probationary period. If he completes the three months probation without incident he is to be credited with his full seniority from his first date of hire.

Ian STONEBRIDGE, Barry HOWELL, Al MARQUIS

All the evidence shows that these three men did very little drinking that night. They have not been accused of horseplay or property damage.

All three should be reinstated immediately with full seniority in other areas of the plant.

This proposal has been submitted for your serious consideration. In view of the fact that most of the men are still without work we expect that the Company will respond as quickly as possible."

7. It is to be noted that the union devoted a separate paragraph to the case of Rehak, the complainant herein, and requested his conditional reinstatement.

8. It should be observed that throughout its investigation and negotiations and at the time that it made the above proposal, the union was aware of the fact that the company were very much concerned with drinking in this area in particular, and that it considered such conduct a matter for discharge. This was an attitude which had persisted from 1974 when a similar incident occurred in the coke oven area.

9. The company's final response to the union's representations was as follows:

"Re: Coke Oven Mechanical Grievances – J. Webster, H. Marquis, C. Howell, K. Davidson, I. Stonebridge, W. Bell, J. Rehak

This will confirm the resolution of the above mentioned grievances which has been agreed to by the Company and the Union:

1. The discharges of Mssrs. Webster, Bell, Davidson, Rehak, Stonebridge, Marquis and Howell are confirmed and the grievances filed by each of the above mentioned employees will not be processed further and are deemed to be resolved satisfactorily.
2. The Company agrees that Mssrs. Stonebridge, Marquis and Howell will be hired by the Company as soon as possible as new employees. Upon satisfactory completion of their probationary period as specified in the agreement, they will each be credited with the service they had accrued up to the date of their discharge and such service only will be added to the service which they will have accumulated upon completion of their probationary period. No credit for the time between the date of their discharge and the date of their hire will be included."

10. Rehak does not dispute the fact that he was drinking on company premises. He feels, however, that he ought not to be bound by the negotiated settlement, but should have his case carried forward to arbitration. He takes this view notwithstanding the fact that he gave his consent to the procedure adopted by the union. In this respect, regard must be had for what was said by the Board in the *Ford Motor Company of Canada, Limited* case (1973) OLRB Reps. Oct. 519. At paragraph 41 of that decision the Board said:

"One of the most difficult areas in applying the duty is in the settlement of grievances. We think it clear that the union's obligation to administer the collective agreement gives it the right to settle grievances. An employee does not have an absolute right to have his grievance arbitrated. One should consider that the negotiation of the collective agreement was a group affair and certain interests yielded to others, and there is no reason why the administration of the collective agreement, including the grievance-arbitration provisions should not be based on the same considerations. In determining fairness within the meaning of the Act one must consider the merits of the claim, the effect on others in the bargaining unit, the implications of settlement or arbitration on the future and whether there is any evidence of bad faith, discrimination or arbitrariness in the compromises effected. Motive may be significant in assessing prohibited conduct particularly when considering the admonition against bad faith."

11. In the present case, the Board is satisfied that the union, in dealing with this whole incident and in particular with the case of the complainant, did not act in a manner that was arbitrary, discriminatory, or in bad faith.

to reopen this Contract in accordance with this paragraph, it shall notify the other party thereto, in writing, between the sixtieth (60th) and thirtieth (30th) day prior to July 1, 1976. Failure to give such notice shall result in the automatic extension of the application of the Basic Rates and hourly rates and rate ranges contained herein to the termination of this Contract under its terms.

119. In the event either party notifies the other of its election to terminate or amend this Contract as aforesaid in paragraph 117 and 118, this Contract, subject to such notification shall continue in full force and effect during the period of negotiation until a new Contract or a modified Contract has been agreed upon PROVIDED, HOWEVER, that if after the expiration of said notice the parties have not been able to agree upon a new or modified Contract, the terms and provisions of this Contract nevertheless continue to remain in full force and effect after said period until either party shall have given the other an additional ten (10) days written notice of its wish to terminate this Contract.

4. Relying on this contractual language, the parties entered into an exchange of correspondence, beginning in April of this year. Notice to bargain was given by the union in a letter, dated April 7th. This letter expressly pointed out that the timing of the notice did not comply strictly with the period set out in section 118 of the collective agreement, and asked that negotiations start as soon as possible because of a June furniture show and the approaching summer vacation period. The employer replied to this request in a letter, dated April 15th, indicating that a Mr. Chimenti had been appointed chairman of the employer's negotiating team and that he would be in touch with the union shortly. Chimenti wrote to the union on April 28th, proposing a negotiating meeting in Montreal for May 14th. Apparently, meetings actually took place on June 15th and 28th, an impasse being reached after the union rejected an offer that was characterized by the employer as its "final offer". Subsequently, on July 12th, the union, through its solicitor, wrote to the Minister, requesting the appointment of a conciliation officer. On the same date, the union's solicitor wrote to the employer, the text of which letter is set out below:

Dear Sir:

Re: Wage Negotiations between Kroehler Mfg. Co. Limited and U.I.U.
Locals 199 – Stratford and 402 – Montreal

I represent the Upholsterers' International Union of North America who have instructed me to write you in connection with the wage negotiations between yourselves and my client in respect of its Local Unions 199 and 402.

As you know, Norman Chimenti, the Chairman of your negotiating team made a final offer to the union negotiating team. I believe you are aware that the offer has been rejected.

The purpose of this letter is to provide Kroehler with notice under Article XX. Section 119, of election by my client to terminate the collective agreement in ten days. It is our position that this notice results in the termination of the collective agreement as of July 23rd, 1976.

I have also been instructed to seek conciliation in Ontario and a letter will be going out to this effect on even date. It is the intention of my client to advise the conciliation officer that the parties are too far apart to obtain any benefit from conciliation itself.

5. The matter was then referred to the Labour Relations Board to determine whether, in these circumstances, the Minister had authority to appoint a conciliation officer. Section 15(1) of the *Labour Relations Act* clearly provides that the Minister not only has the authority, but is required to appoint a conciliation officer in those cases where proper notice to bargain has been given. Proper notice in this type of case (where the parties have already entered into a collective agreement) is defined by sections 45(1),(2):

45. – (1) Either party to a collective agreement may, within the period of ninety days before the agreement ceases to operate, give notice in writing to the other party of its desire to bargain with a view to the renewal, with or without modifications, of the agreement then in operation or to the making of a new agreement.

(2) A notice given by a party to a collective agreement in accordance with the provisions of the agreement relating to its termination or renewal shall be deemed to comply with subsection 1.

These statutory provisions make proper notice to bargain conditional upon the termination of a collective agreement. Subsection (1) contemplates a situation where the collective agreement is terminated by the simple expiry of its term, while subsection (2) contemplates a situation where the collective agreement may be terminated through some other agreed-upon procedure. In both cases, however, termination of the collective agreement is an essential condition of proper notice to bargain.

6. In this case, therefore, it is necessary to find a valid provision for termination during the term of the collective agreement in order to determine that notice of desire to bargain has been given in accordance with section 45 of the Act. It was argued for the union that the three sections of Article XX must be read together as giving either party the option of terminating the contract where agreement has not been reached on the amendment of hourly rates and the rate ranges at the end of the second year of the term of the contract. The employer, on the other hand, contended that, given sections 44(3) and 44(5) of the Act, any provision for early termination was repugnant to the scheme of the Act and, therefore, inoperative.

7. We do not consider either argument to be totally persuasive. The employer's argument, in our opinion, goes too far, and would result in a complete prohibition of mutually agreed-upon arrangements for termination prior to the expiry of a fixed term. Sections 44(3) and 44(5) restrict the power of the parties to revise the term of a collective agreement, once an agreement has been entered into and a term has been set, but these provisions do not prevent the parties from agreeing to a collective agreement which in itself provides for termination prior to the expiry of a fixed term. This latter type of arrangement would merely have the effect of making the term of the collective agreement unspecified, rather than fixed and certain, a possibility clearly contemplated by section 44(1) of the Act. The legislative scheme, therefore, does not completely prohibit built-in arrangements for early termination,

but only reduces such arrangements to a one-year term certain, in order that the "open period" for certification applications and termination applications be readily ascertainable.

8. The question in this case, then, is whether the parties did build into the collective agreement a procedure for early termination at the option of either party upon a failure to agree upon amendment of the wage schedule. If, in fact, such a provision does exist in the collective agreement, its effect would be to convert the term of the collective agreement from a term of three years certain to an unspecified term. The result, by operation of section 44(1), would be a reduction of the term of the collective agreement to one year running from the date that it commenced to operate. Despite the reduction of its term, the collective agreement would have been renewed for a further year by operation of section 117 of the collective agreement (providing for renewal in the absence of notice from one of the parties). The notice given in the letter, dated April 17, 1976, could then be construed as an attempt by the union to give notice under section 54(2) of the Act. We recognize that the notice of April 7th might not conform strictly with the provisions of section 117, since it was initiated earlier than the sixtieth day preceding the expiration of the current term. It is clear, however, that the employer did have notice of the union's desire to negotiate, that the employer was in receipt of that notice between the sixtieth and thirtieth day preceding the expiration of the current term, that the employer did not object to the untimeliness of the initiation of the notice but, rather, proceeded to negotiate with the union. In these circumstances, section 15(2) of the Act would still preserve the Minister's authority to appoint a conciliation officer. This finding, however, is not essential in view of our decision as to the existence of an early termination provision in the collective agreement.

9. The answer to the question of whether the parties have agreed to an early termination provision must be found in the language of the collective agreement. The union sought to introduce certain evidence relating to negotiating history as an aid to interpreting this language. Evidence going to the intention of the parties during negotiations is usually less than helpful. The nature of the negotiating process often makes such evidence vague, incomplete, and sometimes unconsciously self-serving. It is not surprising, therefore, that such evidence is usually in conflict. We do not consider that this is a case where it is appropriate to resort to evidence of negotiating history. Although the language is difficult, it is possible to arrive at a reasonable interpretation of what the parties intended without having to resort to evidence of dubious value.

10. At the core of this interpretation is section 119. In the absence of this section, it would be clear that the parties had agreed only to a three-year collective agreement and to the simple negotiation of amendments to the wage scale in that agreement while the contract continued in operation. This kind of arrangement has been considered by the Board on three previous occasions, and on all three occasions was found not to have the effect of entitling the parties to terminate the collective agreement prior to the expiry of its term. See *Fern Shoe Co. Ltd.*, (1952), 52 CLLC ¶17,020, *Rowson's Tavern*, (1954), 54 CLLC ¶17,077, and *C.W. Henderson Cartage Ltd.*, [1961] OLRB Rep. Oct. 252. The inclusion of section 119, however, raises the possibility that the parties might have contemplated something more than the simple negotiation of amendments to the wage rate without termination of the contract.

11. A reading of section 119 indicates that it envisages two situations – 1) termination of an expired contract, as provided for in section 117; 2) amendment of an existing contract.

as provided for in section 118. In these two situations, even though notice has been given, it has been agreed that the terms of the contract shall continue to operate during the negotiations for a new contract or a modified contract. Of crucial importance is the proviso that follows. Does this proviso, by itself, confer upon the parties a right to terminate the contract or does it merely provide for a procedure for termination where such a right exists? We consider the latter interpretation to be the more reasonable one. The wording of the proviso refers only to a "wish to terminate". This term, in our view, cannot by itself create a right to terminate. Termination can flow only from a clearly expressed right to terminate, such as found in section 117. One may wish to terminate an arrangement, but one can only execute that wish if there exists the legal power to do so. Nowhere in this collective agreement can there be found any provision expressly empowering either party to terminate the collective agreement upon a failure to agree to an amendment of the wage scale. The proviso contained in section 119, therefore, must be interpreted as only providing a procedure for terminating a contract that has expired, but has been extended by operation of the first part of section 119.

12. The language of this contract, therefore, does not provide for its termination in advance of the clearly described termination date in section 117. Although the parties may negotiate for an amendment of the wage rates at the end of the second year of the term, neither party may terminate the contract unilaterally prior to the expiry of its full three-year term. From this conclusion, it follows that the union could not give notice as required by section 45 and, therefore, is not entitled to conciliation under section 15(1).

13. The Minister, therefore, is advised that she does not have authority to appoint a conciliation officer in the circumstances of this case.

0520-76-M Labourers' International Union of North America, Local 527, (Applicant), v. **Paul D'Aoust Construction Limited and The Ottawa Construction Association**, (Respondent).

Arbitration – Construction Industry – Whether Collective Agreement – Whether employer authorized association to bargain on its behalf – S. 43(2) – Effect of association including employer on list of companies represented by it though not authorized to do so.

BEFORE: M. G. Picher, Vice-Chairman, and Board Members J. D. Bell and P. J. O'Keeffe.

APPEARANCES: *F. Manoni and A. Carfagnini for the applicant; F. J. McDonald and R. Poiras for Paul D'Aoust Construction Limited; J. R. McFarland for The Ottawa Construction Association.*

DECISION OF VICE-CHAIRMAN M. G. PICHER, AND BOARD MEMBER P. J. O'KEEFFE, September 13, 1976:

1. This is an arbitration filed by the applicant under section 112a of The Labour Relations Act.

2. The grievance is in the nature of a policy grievance brought on behalf of the union and its members alleging the breach of virtually all obligations of the respondent employer under some eight articles of a collective agreement negotiated between the respondent employer's organization, the Ottawa Construction Association and the applicant union, and purporting to bind the respondent employer.

3. The agreement in question was concluded between the respondent association and the applicant union on May 16, 1975 and is effective from May 1, 1975 to April 30, 1979. The breaches alleged against Paul D'Aoust Construction Limited relate to Article 2, the recognition clause; Article 4, the union security clause; Article 5, a clause requiring the engagement of sub-contractors who employ only union members insofar as possible; Article 9, providing for the appointment of job stewards; Article 11, respecting welfare, vacation pay and pension fund contributions; Article 12, hours of work and overtime pay rates; Article 16, vacation pay and Article 18, which deals with rates of wages.

4. At the hearing, counsel for the respondent employer, Paul D'Aoust Construction Limited, raised a preliminary objection as to the arbitrability of this grievance. The objection, simply stated, is that Paul D'Aoust Construction Limited never authorized, either orally or in writing, the Ottawa Construction Association to bargain on its behalf or to execute a collective agreement on its behalf. Counsel submits that since an agent cannot bind his principal to a contract unless he has authority to do so, Paul D'Aoust Construction Limited is not a party to the collective agreement before us. He goes on to say that since, as between the employer and the union, there is no collective agreement as described in section 112a of the Act, this Board is without jurisdiction to arbitrate. At the hearing the Board reserved its decision on the preliminary motion.

5. Many of the facts are not in dispute. The issues make it necessary to review all of the facts in some detail.

6. The respondent Ottawa Construction Association is an employer's organization which is not accredited under The Labour Relations Act.

7. The respondent Paul D'Aoust Construction Limited is a member of the respondent employers' organization and has been for at least fifteen years.

8. A collective agreement that is not the subject of this grievance existed between the respondent employer and the applicant union between May 7, 1974 and April 30, 1975 in the United Counties of Stormont, Dundas and Glengarry. That agreement was negotiated directly between the parties to it, specifically between Mr. McDonald and Mr. F. Manoni, and not through the Ottawa Construction Association. The agreement followed negotiations undertaken pursuant to a certificate of this Board dated February 6, 1974 and issued to the union for a bargaining unit that consisted of employees of Paul D'Aoust Construction Limited in the United Counties of Stormont, Dundas and Glengarry. The union is still entitled to bargain on behalf of the employees of the respondent Paul D'Aoust Construction Limited who are working within that geographic area.

9. On January 13, 1975 Mr. Manoni, who is the Business Manager of the applicant union, wrote to Paul D'Aoust Construction Limited by registered mail giving notice of the union's intention to negotiate the renewal of that collective agreement. The letter states:

"Dear Sir:

As per Article 1 of our current agreement, please be advised that we wish to renew our present agreement with changes. Please advise of time and place suitable to you.

If you wish to be represented by an association i.e. Ottawa Construction Association, please advise.

Yours truly

(signed) F. Manoni
Business Manager"

10. At this point complete agreement on the facts appears to end, as much of what follows concerns the state of mind of the three parties, who clearly were not *ad idem*.

11. The Board accepts the evidence of Mr. R. Poitras, Office Manager of Paul D'Aoust Construction Limited, that upon receipt of the letter of Mr. Manoni he formed the opinion that the employer had nothing to negotiate with the union since its work in the United Counties was complete. This is established by a memo filed in evidence, between Mr. Poitras and Mr. McDonald who is legal counsel to the employer. The memo, dated January 20, 1975 states in full:

"Further to our telephone conversation of today please find enclosed a registered letter received from Mr. F. Manoni Business Manager for the Labourer's International Union of North America Local 427.

Our project in Cornwall is closed since October 23rd 1974 – Job is 100% completed.

If you need some more informations [sic] do not hesitate to contact the writer [sic].

Yours very truly

(signed) R. Poitras"

12. By letter dated January 24, 1975 Mr. McDonald replied to Mr. Poitras' memo, essentially advising him that in view of the fact that Paul D'Aoust Construction Limited had no projects in the area covered by the previous agreement "... there would appear to be no valid reason for you to enter into a new contract with Mr. Menoni [sic]".

13. It is significant to the state of mind of the parties and, in retrospect, most unfortunate, that neither Mr. Poitras nor anyone else on behalf of Paul D'Aoust Construction Limited subsequently paid Mr. Manoni the courtesy of a reply.

14. During the late winter and early spring of 1975 the applicant union and the respondent Ottawa Construction Association were engaged in bargaining for a collective agreement between the union and certain member employers of the association. That agree-

ment is the subject of this arbitration. The Board accepts the evidence of both Mr. Poitras and Mr. J. R. McFarland who, as Eastern Ontario Representative of the Construction Labour Relations Association of Ontario, was involved in the negotiations on behalf of the Ottawa Construction Association, that Paul D'Aoust Construction Limited did not, either orally or in writing, authorize the respondent association to negotiate on its behalf in the late winter and early spring of 1975 with the applicant union, or in the negotiation of any collective agreement with any union before or since. It was established before us that it was the consistent practice of Paul D'Aoust Construction Limited to always conduct its collective agreement negotiations separately from the association and exclusively through its legal counsel.

15. In the course of the negotiations between the union and the employer's association, on March 18, 1975, Mr. McFarland, acting on behalf of the Ottawa Construction Association, forwarded to the union by mail a list of member employers for whom the association had authority to negotiate and execute an agreement as required by section 43(2) of The Labour Relations Act. That list bore the names of eighty employer members, including the name of the respondent Paul D'Aoust Construction Limited.

16. Mr. McFarland testified that the list was prepared under his supervision and that the inclusion of the respondent Paul D'Aoust Construction Limited on the list was an error. The Board accepts Mr. McFarland's evidence that he could not explain the cause of the error. He admitted that it was his responsibility to check the list for its accuracy, that his final scrutiny of it consisted, in his own words, of "a cursory glance" and that, as he said "I didn't proofread the list name by name".

17. On May 16, 1975 the collective agreement now before us was concluded between the parties who are described in the heading as "Each of the Undersigned Contractors (herein severally called 'The Employer') as party of the first part and Labourers' International Union of North America, Local 527 (herein called 'The Union') as party of the second part." The second to last section of the agreement states:

"The Companies listed in Appendix "B" agree to be bound by this agreement and the provisions of the Welfare and Vacation Pay Trust Documents."

The next page is entitled "Schedule B" and consists of a list of eighty seven employers, being all of the names that appear on the list of March 18, 1975 along with the names of seven additional employers. Again the name of Paul D'Aoust Construction Limited is included. There is no doubt that "Schedule B" is what is referred to in the body of the agreement as Appendix "B".

18. According to the testimony of Mr. McFarland, pursuant to the normal procedures of the respondent association, the collective agreement was subsequently ratified not by the eighty seven signatory employers but by the Executive Committee of the Ottawa Construction Association. There is no evidence before us that Paul D'Aoust Construction Limited was a member of that Committee.

19. There is a divergence in testimony as to what next happened. Mr. Poitras admits that in late August, 1975 he received by mail a memorandum dated August 20, 1975 from the respondent Ottawa Construction Association bearing the following heading:

“TO: Signatories to the Labourers Local 527 Collective Agreement

RE: Collective Agreement – Labourers, Local 527”

The body of the memo is an article by article comment in note form on those provisions of the collective agreement that involve changes from the preceding agreement. The first paragraph of the memo states:

“Enclosed is a copy of the new Collective Agreement with the Labourers, Local 527. The agreement is effective from May 1, 1975 to April 30, 1979.”

Mr. Poitras denies that the memo was accompanied by a copy of the collective agreement. He states that he believed that the memo was in the nature of an information bulletin addressed to all members similar to the bulletins and plan sheets that Paul D’Aoust Construction Limited received regularly by mail from the respondent association, and that he therefore disregarded it. He states that he felt reinforced in his view that the agreement had no application to Paul D’Aoust Construction Limited by the wording of the first explanatory note which appears near the top of the front page of the memo:

(1) *Article 2 – Recognition*

Dundas, Stormont and Glengarry counties added to Zone II.”

According to Mr. Poitras, he formed the opinion that the three counties named described the entire geographic area in which the agreement would be in force rather, than as the plain language suggests, than that these counties were *added* to the area covered by the previous agreement with the applicant union. He says that he concluded that since the agreement was, as he thought, only in force in those three counties, and that Paul D’Aoust Construction Limited had no projects in those counties, it could not be subject to the agreement that the memo related to.

20. On one part of this point the evidence given by Mr. McFarland on behalf of the Ottawa Construction Association is opposed to that of Mr. Poitras. Mr. McFarland was emphatic that all members of the association who were sent the memorandum of August 20, 1975 were also sent, under the same cover, a copy of the collective agreement. He stated that the copies of the agreement sent out did not contain “Schedule B” listing the members bound by it. Having regard to the demeanor of the witnesses and the whole of the evidence before us, and considering that Mr. McFarland, being closely involved with the preparation and mailing of these materials would have a more reliable recollection, we find that Paul D’Aoust Construction Limited did receive by mail a copy of the collective agreement in question under the same cover as the memorandum addressed to “Signatories to the Labourer’s Local 527 Collective Agreement”, and that the copy of the collective agreement received did not include “Schedule B”, the list of signatories.

21. At the time it received the memo and the copy of the collective agreement Paul D’Aoust Construction Limited did nothing to get in touch with either the applicant union or the respondent association.

22. So matters rested until April 5, 1976 when Paul D'Aoust Construction Limited received a letter dated April 1, 1976 from Russel M. Tolley and Associates, trust fund administrators for the applicant union. The letter advised the respondent employer that it appeared to be in arrears with respect to its apparent obligation to provide reports and trust funds under the collective agreement. On April 7, 1976 Mr. Poitras replied by letter, a copy of which was not sent to the union, that Paul D'Aoust Construction Limited had nothing to remit inasmuch as "... the previously signed agreement with the above union for the United Counties of Stormont, Dundas and Glengarry is no more in effect due to the fact that the Cornwall project is closed since September, 1974."

23. Paul D'Aoust Construction Limited then received a further written inquiry as to its arrears respecting its apparent obligation to remit pension fund contributions under the collective agreement in question, this time from the Labourers Pension Fund of Central and Eastern Canada. By letter dated June 3, 1976 Mr. Poitras made substantially the same reply as in his letter of April 7, 1976, a copy of which he enclosed. This time, however, he sent a copy of his reply to the applicant Labourers' International Union of North America, Local 527. The Board accepts the statement of Mr. Manoni, not seriously challenged by either respondent, that the copy of the letter of Mr. Poitras dated June 3, 1976 was the first notification that the applicant union had that the respondent employer did not consider itself bound by the collective agreement executed on its behalf by the Ottawa Construction Association on May 16, 1975. Mr. Manoni states that the union received the copy of Mr. Poitras' letter during the working week of June 7 to 11, 1976. By letter dated June 14, 1976 Mr. Manoni, on behalf of the union, advised the respondent Paul D'Aoust Construction Limited that the latter was, in the opinion of the union, in breach of the collective agreement of May 16, 1975, asked for a meeting with the employer as provided by the grievance procedure under the agreement and gave notice that the union was referring the grievance to arbitration by way of section 112a of the Ontario Labour Relations Act.

24. At meetings between the union and the employer on June 18, 1976 the matter went unresolved, Paul D'Aoust Construction Limited taking the position that since it was mistakenly included in both the list prepared pursuant to section 43(2) of The Labour Relations Act by Mr. McFarland and the list entitled "Schedule B" describing the signatories to the contract, it was not bound by the collective agreement. That remains the employer's position before this Board and the basis for its preliminary motion respecting arbitrability.

25. Mr. McFarland explained to this Board the normal procedure by which a member employer would indicate to the Ottawa Construction Association that it authorized the association to bargain on its behalf. The usual practice is for the member to file a written proxy with the association giving the required authorization. He stated that authorization sometimes was given by means of a letter from a member to the association and in other instances by means of a letter from a member to a union indicating a desire to be represented by the association which letter would then be provided to the association by the union.

26. There is no suggestion before us that the union ever received and subsequently conveyed to the association such a letter of authorization from Paul D'Aoust Construction Limited. But it is clear from the evidence before us that at least two administrators of the Ottawa Construction Association were not convinced beyond a doubt that Paul D'Aoust Construction Limited had not given by written proxy its authorization to be represented by the association in the negotiation of the collective agreement. Mr. McFarland testified that

when he was finally asked by Mr. Manoni about the status of Paul D'Aoust Construction Limited both he and Mr. W.P. Becker, General Manager of the association, searched the records of the employers' organization "two or three times" in an attempt to find a proxy from the respondent employer. This part of the evidence establishes that at all material times the respondent association was under the impression that the respondent Paul D'Aoust Construction Limited was bound by the collective agreement. An impression, it should be added, that it could only have been reinforced by the fact that Paul D'Aoust Construction Limited had, as we have found, received both a copy of the collective agreement, and had done nothing to react or reply to either the respondent association or the applicant union.

27. We turn now to the preliminary objection. The nice question raised is whether there is in fact before us a collective agreement between the applicant union and the respondent Paul D'Aoust Construction Limited.

28. The arguments raised on behalf of the union go to the heart of the collective bargaining process. The important question is whether a union in the position of an innocent third party without notice of the equities between an employer's association and its members is entitled to rely on the representations of an employers' association which purports to bargain for and execute a collective agreement on behalf of one of its members. The uncertainty that arises if it is not so entitled threatens the integrity of the collective bargaining process wherever such associations are involved.

29. The very linchpin of the Labour Relations Act is its recognition of collective entities representing both employees and employers for the purpose of facilitating collective bargaining. If those collective bodies cannot contract with each other with the certainty that the employers and employees that they represent will be bound by their contracts the facility provided by the Act becomes useless. The Legislature could not have intended a result so inconsistent with the purpose of the Act.

30. The collective agreement before us must be construed in the light of the Labour Relations Act. Section 43(1) of the Act is as follows:

A collective agreement between an employers' organization and a trade union or council of trade unions is, subject to and for the purposes of this Act, binding upon the employers' organization and each person who was a member of the employers' organization at the time the agreement was entered into and on whose behalf the employers' organization bargained with the trade union or council of trade unions as if it was made between each of such persons and the trade union or council of trade unions and upon the employees in the bargaining unit defined in the agreement and, if any such person ceases to be a member of the employers' organization during the term of operation of the agreement, he shall, for the remainder of the term of operation of the agreement, be deemed to be a party to a like agreement with the trade union or council of trade unions.

31. That section appears to set up two conditions for an employer to be bound by the contract concluded by an employers' organization: 1) the employer must be a member of the organization; 2) the organization must bargain on behalf of that member. It is common

ground that in the instant case Paul D'Aoust Construction Limited was and is a member of the respondent employers' organization. The next question is whether in this instance the association bargained "on behalf of" that member, within the meaning of the words "on whose behalf the employers' organization bargained" appearing in the section.

32. The words "on whose behalf" or "on behalf of" are susceptible of at least two meanings in this context. They can mean "in the name of", without more; they can also mean "in the name of and with whose authorization". In the instant case the association clearly bargained in the name of the respondent employer, although they may not have been entitled to. The first construction of "on whose behalf" applied here would indicate that the respondent employer is bound. This would involve interpreting section 43(1) in such a way as to create a form of strict liability in the member employer. It would also guarantee that a union dealing with an association need not look behind the list of members provided by that association to know with whom it has a binding contract. On the other hand, if the words "on whose behalf" are understood to mean "and with whose authorization" it then becomes necessary to determine whether in this case, applying normal principles of agency, Paul D'Aoust Construction Limited expressly or impliedly authorized the association to bargain on its behalf.

33. Did the Legislature intend that section 43(1) should operate to bind an employer to a collective agreement negotiated without his authorization but in his name by an employers' organization of which he is a member? We think so.

We do not have to speculate or assume that the Labour Relations Act intends that an employer can be strictly bound by a collective agreement concluded by an employers' organization of which he is a member where that organization acted without his permission. That is precisely the effect of section 43(2) which provides as follows:

When an employers' organization commences to bargain with a trade union or council of trade unions a list of the names of the employers on whose behalf it is bargaining and, in default of so doing, it shall be deemed to bargain for all members of the employers' organization for whose employees the trade union or council of trade unions is entitled to bargain and to make a collective agreement at that time, except an employer who, either by himself or through the employers' organization, has notified the trade union or council of trade unions in writing before the agreement was entered into that he will not be bound by a collective agreement between the employers' organization and the trade union or council of trade unions.

34. By section 43(2), subject to individual employers giving prior notice to the union in writing, where the association fails to provide a list all of its members will be bound. And this would appear to be so whether the failure to provide the list was inadvertent or deliberate, innocent or fraudulent. It is worth noting that in its origins this section was stricter still, and that it was not until the Labour Relations Amendment Act, 1954, S.O. 1954 c. 42, s. 10 that employers were granted the saving grace of actual notice to the union.

35. There can be no question that the Legislature intended from the very beginning of the Act that an innocent employer could be strictly held to a contract negotiated by an association of which he is a member and which acted without his authorization. This would

be so where an association negligently failed to provide a list. Is the intention of the Act any different where the association negligently failed to provide a proper list? It is not.

36. The words “on whose behalf” in section 43(1) are reasonably capable of bearing either of the two meanings that we have suggested. Faced with such a choice it is the duty of any judicial body to opt for the interpretation most in sympathy with the general scheme and objectives of the Act. In his recent book entitled *The Construction of Statutes* (Toronto, 1974) at page 37 Professor E. A. Driedger comments on the attitude that an adjudicator should assume when faced with widely divergent consequences flowing from two competing meanings attributable to a statutory provision when both meanings are reasonable:

“His initial reaction ought only to serve as a warning to read the statute closely and carefully. If, after having done so, he finds that one of the two constructions is not one that the words are reasonably capable of bearing, he must reject it, whatever may be the consequences of the other, for there is then only one meaning. But if he finds that the words are reasonably capable of both constructions, then he must select the one that is best in harmony with the words, intention and object of the statute ...”.

Applying that approach in the instant case we find that “on whose behalf” must mean “in whose name”, without more. The employer is, therefore, bound by a collective agreement negotiated in his name and without his authorization by an employers’ organization of which he is a member, subject to a qualification that we shall discuss later. This consequence of section 43(1) of the Act is more in harmony with the general intention of the Act to facilitate collective bargaining and with the particular intention of the Legislature expressed in section 43(2).

37. Our decision would not be any different if we are wrong in assuming that “on whose behalf” is reasonably subject to two interpretations. If the only reasonable meaning of “on whose behalf” is “in whose name and with whose authority” we find that such a meaning gives rise to obvious disharmony within the context of sections 43(2) and 43(5) and the general intention of the Act to facilitate bargaining on a collective basis. It is an established rule of construction that:

“... the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity *in relation to*, or some repugnance *to* or inconsistency *with*, the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity, repugnance or inconsistency, but no farther.”

(Driedger, op. cit. at p. 29, citing *Grey v. Pearson* (1857) 6 H.L.C.G.I.; 10 E.R. 1216 per Lord Wensleydale). In this case if the words “on whose behalf” must be taken in ordinary language to require permission their meaning results in disharmony with subsection 43(2) and with the general intention of the Act for the reasons already stated. Following Lord Wensleydale’s approach in such a circumstance this Board may modify that meaning if absurdity or disharmony would result from it. It would be indeed absurd if an employer could be bound to a contract negotiated without his authority by an employers’ organization because that organization negligently fails to provide a list of employers (the necessary effect of section 43(2) but not be bound where the same organization negligently provides an erroneous list.

The reasons for binding the employer in the first instance, under section 43(2), is to give certainty to the expectations of the union about the parties with whom it bargains and to require the employers' organization to give the union the information it needs for that certainty. These reasons are equally compelling in the second instance, under section 43(1). To ignore them by interpreting "on whose behalf" as requiring permission would produce a repugnance and disharmony between section 43(2) and section 43(1) as it applies in this case, and would be to construe section 43(1) in a manner inconsistent with the overall intention of the Act.

38. It should be noted that the strict liability which we find imposed by section 43(1) is not strange to our law. It is an application of the principle that in certain instances persons who deal at arm's length with bodies that have internal structures and procedures should not have their interest defeated by some failure occurring entirely within those structures and procedures. The "indoor management" rule in the law of corporations is one example of the operation of that principle. In *J. H. McKnight Const. Co. v. Vansickler* (1915) 51 S.C.R. 374, 24 D.L.R. 298 the Supreme Court of Canada, per Duff J. stated that a person dealing with a corporation is taken to have knowledge of statutes and registered public documents affecting the corporation and should satisfy himself that those have not been breached in the dealings that involve him, and went on to say:

"... but they are not bound to do more; they need not inquire into the regularity of the internal proceedings – what Lord Hatherley called 'the indoor management'. They are entitled to assume that all is being done regularly.

... This rule is based on the principle of convenience for business could not be carried on if a person dealing with the apparent agents of a company was compelled to call for evidence that all internal regulations had been duly observed."

39. The reasoning in that case is no less compelling when collective bargaining is the business and a breach of the internal regulations of an employers' organization, incorporated or not, is relied on to defeat a contract. A party dealing with a body such as the Ottawa Construction Association need not inquire into the regularity of the internal proceedings of that body. To require that it would undermine the efficiency of the collective bargaining process, and would run counter to the general intention of the Labour Relations Act to facilitate and promote that process. Section 43(1) cannot be interpreted to intend such a result.

40. The rationale of the 'indoor management rule' has been applied elsewhere in labour relations. In the recent case of *Zehr's Markets Limited* (Board File No. 1151-75-R, July 26, 1976) the Board was faced with the issue of whether a subsisting collective agreement operated as a bar to certification. The employer had executed the agreement relying on the representations of the union to the effect that the agreement had been ratified by the employees. In fact no such ratification had occurred. The applicant union argued that the employer could not assert an agreement executed on that basis as a bar to certification. In upholding the validity of that agreement and rejecting the union's view the Board stated:

"The Board does not normally concern itself with all of the procedures which may be adopted by a union for the purpose of obtaining ratification

of the terms of a collective agreement under its constitution or by-laws. Also the Board does not normally impose on an employer an obligation to become involved in the procedures which may or may not be adopted by the union under its constitution for the purpose of ratification. In this case the representatives of the union held out to the company prior to the signing of the collective agreement that the terms of that agreement had already been ratified by the employees in the bargaining unit. We believe that the employer has a right to accept these representations as having been made in good faith and it is difficult for us to understand why the employer, in the face of these representations, must then launch some enquiry for the purpose of assuring itself that the terms of the union by-laws or constitution of ratification procedures have been complied with."

41. The Board's reasoning in that case is manifestly appropriate to the circumstances of the instant case. We make no comment about what the result might be if a union in the position of the applicant had actual or constructive notice of the departure from the internal procedures of the employers' organization prior to concluding the agreement, or what form of notice would suffice to shield an employer from the effect of section 43(1). Suffice it to say that there is no evidence of any such notice in the matter before us.

42. One last qualification must be made. In our view the Legislature did not intend by anything in section 43 of the Act that a union in the position of the applicant should emerge with the right to represent employees for whom it held no prior bargaining rights. A union is not entitled to use a circumstance such as this to circumvent the normal routes of certification or voluntary recognition and come away with windfall bargaining rights and a collective agreement to boot, when the voluntary wishes of both employer and employees might well be otherwise.

Section 43 protects the interest of the union, but it does not expand that interest. This is clear from the words of section 43(2) where in the absence of a list an employers' organization is deemed to bargaining "... for all members of the employers' organization *for whose employees the trade union or council of trade unions is entitled to bargain and to make a collective agreement at that time...*". [emphasis added]

43. In our view what is expressed in section 43(2) must be implied in section 43(1). The latter section can be read to protect the interests of the union only insofar as that interest exists in the form of bargaining rights. Like section 43(2), it protects those bargaining rights by giving effect to them. It does not create new bargaining rights.

In the instant case at the time of the making of the collective agreement the Labourers' International Union of North America, Local 527 held bargaining rights for employees of Paul S'Aoust Construction Limited in the United Counties of Stormont, Dundas and Glengarry, and nowhere else. This was by virtue of the certificate of the Ontario Labour Relations Board and the collective agreement mentioned in paragraph 8, *supra*. By section 43(1) the Ottawa Construction Association is deemed to have bargained on behalf of Paul D'Aoust Construction Limited for employees covered by that agreement and for no other employees. To conclude anything more would result in windfall bargaining rights for the union and produce a result in disharmony with the clear limitation contained in section 43(2).

44. We therefore find that there is a collective agreement between the applicant union and the respondent employer. The collective agreement is that negotiated between the Ottawa Construction Association and the applicant union dated May 16, 1975, subject to the effect of section 43(1) of the Labour Relations Act. The effect of that section is that Paul D'Aoust Construction Limited is bound by that agreement but only to the extent that it affects its employees for whom the union held bargaining rights at the time of the making of the collective agreement, that is its employees in the United Counties of Stormont, Dundas and Glengarry.

45. It is common ground that at all material times the respondent Paul D'Aoust Construction Limited had no employees within that geographic area. There has, therefore, to date been no breach of its obligations under that agreement.

46. This application is therefore dismissed.

DECISION OF BOARD MEMBER J. D. BELL:

I concur with the decision of the Board that this grievance, filed under section 112(a) of The Labour Relations Act, must be dismissed. However, I do not agree with the reasoning of the majority that section 43(1) binds a company to the agreement negotiated by the Association, such Association having included the company's name by mistake on the list submitted to the union and the company had not authorized the Association to act as its agent for purposes of collective bargaining.

0623-76-M Mechanical Contractors Association of Ottawa, (Applicant), v. J. G. Rivard Limited, (Respondent).

Arbitration – Section 112a – Whether the Board has the jurisdiction to hear a grievance filed by an accredited employer organization against an employer bound by the accreditation certificate.

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members J. Bell and O. Hodges.

APPEARANCES: *James B. Chadwick and H. G. Burchill for the applicant; David Wakely, Kenneth Radnoff and Jean-Guy Rivard for the respondent.*

DECISION OF THE BOARD: September 22, 1976

1. The applicant has referred to the Board under section 112a of the Act a dispute between itself and the respondent which the applicant alleges arises out of a breach on the part of the respondent of the terms of a collective agreement between Local Union 71 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of The United States and Canada and The Mechanical Contractors Association of Ottawa, effective from May 1, 1975 to April 30, 1977.

2. The dispute is set out in the form of a grievance which reads:

"WHEREAS the Mechanical Contractors Association of Ottawa is an employers organization accredited pursuant to the provisions of The Ontario Labour Relations Act, R.S.O. 1970, chapter 232;

AND WHEREAS J. G. Rivard Limited is a company incorporated pursuant to the laws of the Province of Ontario and carries on business as a plumbing and heating contractor in the Regional Municipality of Ottawa-Carleton;

AND WHEREAS the Mechanical Contractors Association of Ottawa has entered into a collective agreement with Local Union 71 of The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada which agreement is dated the 1st day of May, 1976, and is effective to April 30, 1977;

AND WHEREAS J. G. Rivard Limited is bound under the terms of the collective agreement and pursuant to the provisions of The Ontario Labour Relations Act, R.S.O. 1970, chapter 232.

THEREFORE the Mechanical Contractors Association of Ottawa claims that J. G. Rivard Limited is in breach of the terms of the collective agreement and submits this grievance based upon the alleged breach of the said collective agreement as follows: -

1. Article 24.0 of the collective agreement calls for the payment of Industry Fund as follows: -

"Effective May 1, 1975	-	6 cents per hour
effective May 1, 1976	-	7 cents per hour

"24.1 Each employer bound by this agreement will contribute 6-7 cents for every hour worked by each employee covered by this agreement. This contribution will be paid by the 15th of each month following that in which the hours were worked. Payment shall be made to the Mechanical Contractors Association of Ottawa on the forms provided in accordance with the Association's Bylaw 25."

2. The Mechanical Contractors Association of Ottawa claims that the said J. G. Rivard Limited have failed to make any of the payments as required under Article 24.1 of the said collective agreement and the said Mechanical Contractors Association of Ottawa claims that the following monies are owed to them by J. G. Rivard Limited for the payment of the Industry Fund as follows: -

May 1975 1,614 hrs. at 6¢ per hr.	\$ 96.84
June 1975 1,487 hrs. at 6¢ per hr.	89.22
July 1975 2,065 hrs. at 6¢ per hr.	123.90
Aug. 1975 2,142 hrs. at 6¢ per hr.	128.52
Sept. 1975 3,129 hrs. at 6¢ per hr.	187.74
Oct. 1975 4,914 hrs. at 6¢ per hr.	294.84

Nov. 1975 4,385 hrs. at 6¢ per hr.	263.10
Dec. 1975 3,200 hrs. at 6¢ per hr.	192.00
Jan. 1976 3,392 hrs. at 6¢ per hr.	205.52
Feb. 1976 3,226 hrs. at 6¢ per hr.	193.56
Mar. 1976 <u>2,785</u> hrs. at 6¢ per hr.	<u>167.10</u>
Total: <u>32,339</u> hrs. at 6¢ per hr.	<u>\$1,940.34</u>

3. Further, the said J. G. Rivard Limited is in default of payments for the months of April and May of 1976, which amounts have not been calculated at this date.

4. Pursuant to Article 17.2 of the said collective agreement, the Mechanical Contractors Association of Ottawa claims liquidated damages at the rate of 10% per month until the Funds have been paid."

3. Section 112a of the Act provides as follows:

"112a. - (1) Notwithstanding the grievance and arbitration provisions in a collective agreement under section 37, either party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable, to the Board for final and binding determination.

(2) A referral under subsection 1 may be made in writing in the prescribed form by the party at any time after delivery of the written grievance to the other party, and the Board shall appoint a date for and hold a hearing within fourteen days after receipt of the referral and may appoint a labour relations officer to confer with the parties and endeavour to effect a settlement before the hearing.

(3) Upon a referral under subsection 1, the Board has exclusive jurisdiction to hear and determine the difference or allegation raised in the grievance referred to it, including any question as to whether the matter is arbitrable, and the provisions of subsections 5a, 7, 8, 9, 10 and 11 of section 37 apply *mutatis mutandis* to the Board and to the enforcement of the decision of the Board.

(4) The expense of proceedings under this section, in the amount fixed by the regulations, shall be jointly paid by the parties to the Board for payment into the Consolidated Revenue Fund."

4. Mechanical Contractors Association of Ottawa is an accredited employer organization and the respondent, although not a member of the Association, falls within the accreditation certificate and is bound by the collective agreement referred to above.

5. The respondent takes the position that the Board does not have jurisdiction under section 112a of the Act for the reason that the complaint of the applicant is not a grievance within the meaning of section 112a.

6. The respondent further objected to the Board hearing the matter on the grounds that an identical grievance had been instituted in 1973 by Mechanical Contractors Association of Ottawa, the applicant herein, against the respondent herein and two other companies. That grievance was dismissed for lack of jurisdiction by the Joint Conference Board hearing set up under the terms of the then existing collective agreement.

7. In addition, the respondent contended that the Board ought not to proceed, since the matter was presently before the courts and was on the ready list for trial in the Supreme Court of Ontario.

8. One of the reasons given by the Joint Conference Board for dismissing the "grievance" placed before it was that the Mechanical Contractors Association could not, under the terms of the collective agreement as it existed at that time, initiate grievances on its own behalf or on behalf of the employer members. The definition of a grievance contained in the collective agreement dealt with by the Joint Conference Board in the above arbitration was that a grievance was a signed claim in writing by an employer, by the union or by an employee, that the agreement had been violated, misinterpreted or misapplied.

9. In the agreement presently before this Board, the definition of a grievance was altered by the parties and now reads:

"A grievance within the meaning of this Collective Agreement shall mean a written claim in writing by Local Union 71 on its own behalf, by Local Union 71 on behalf of one or more of its members, or by any member or members of Local Union 71, by the MCA on its own behalf, by the MCA on behalf of one or more of the employers on whose behalf this agreement is signed, or by one or more of the said employers alleging that this agreement has been violated, misinterpreted, misapplied, or has been improperly administered."

10. The new definition, as is plain from its terms, enables the Mechanical Contractors Association to make a written claim on its own behalf and on behalf of its members alleging a breach of the collective agreement, a power which it obviously lacked under the former definition. The lack of this power was one of the reasons given by the Joint Conference Board for dismissing the prior grievance, the grounds being that since the Mechanical Contractors Association was not an employer, it did not meet the terms of the definition.

11. As we have already observed, the definition contained in section 16.2 of the agreement now clearly empowers the Mechanical Contractors Association to process a grievance either on behalf of the Association itself or on behalf of an employer, on whose behalf the agreement is signed. A question remains, however, and it is one central to the respondent's case, and that is whether, even with the amendment, a grievance can be instituted by the Association against one of the employers who is covered by the collective agreement for an alleged violation or breach of the agreement. The respondent argues that neither under the collective agreement nor under the provisions of the Labour Relations

Act can a complaint of one employer against a fellow employer who are signatories to a collective agreement constitute a grievance. That is to say, that in this particular matter, a dispute between the Association and the respondent arising out of an allegation of failure of the respondent to pay dues to the Association is obviously not the kind of dispute to be dealt with as a grievance under the Act or the collective agreement.

12. Section 1(e) of the Act defines a collective agreement as follows:

“collective agreement” means an agreement in writing between an employer or an employers’ organization, on the one hand, and a trade union that, or a council of trade unions that, represents employees of the employers’ organization, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, the employers’ organization, the trade union or the employees.

13. Section 110, which is applicable in the present case, in providing that under certain circumstances a collective agreement shall be deemed to exist notwithstanding that there were no employees in the unit at the time the agreement was entered into, speaks of a collective agreement as being an agreement in writing between an employer or employers’ organization on the one hand and a trade union or council of trade unions ... on the other hand.

14. Section 117(2) and section 118 speak of a collective agreement between accredited employers’ organizations and trade unions or councils of trade unions.

15. It is plain from the language used in these sections, that the parties to a collective agreement within the meaning of the Act are the employer or employers’ organization on the one hand, and the trade union or association of trade unions on the other hand, that is to say, the Act recognizes a collective agreement as an agreement dealing with the rights of two groups with different interests. Consequently, when section 112a of the Act provides that “either party to a collective agreement between an employer or employers’ organization and a trade union or council of trade unions” may apply for a final and binding determination of a grievance, it is an inescapable conclusion that the section contemplates a grievance as constituting a dispute between the employer, etc. on the one hand, and the union, etc. on the other hand. It is, therefore, only that type of grievance that permits the parties to a collective agreement to invoke section 112a and which alone gives the Board jurisdiction to act and reach a determination under the provisions of that section.

16. The present “grievance” is clearly not one brought by a party “on the one hand” against a party “on the other hand” as those terms are used in the Act to distinguish between the points of view or interests of the protagonists of the employer and of the union under a collective agreement. The Mechanical Contractors Association and the respondent are virtually the same party in that context. The union is obviously the party “on the other hand”. Section 112a, in referring to “either party”, obviously refers to the distinction between the employer’s interest and the union’s interest as represented by employers on the one hand and unions on the other.

17. The present dispute, notwithstanding the fact that it arises out of the wording of a collective agreement, is clearly a matter arising between two entities of like interest and con-

stitutes an internal dispute between them, and not a dispute between "either party" to the collective agreement within the meaning of section 112a. The "grievance" is therefore not a grievance within the meaning of section 112a, and the Board has no jurisdiction to deal with the matter.

18. The referral is accordingly dismissed.

Editor's Note: An application for Judicial Review of this decision has been filed.

0662-76-R Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters Chauffeurs, Warehousemen and Helpers of America, (Applicant), V. **Dad's Cookies Ltd.**, (Respondent), V. Group of Employees, (Objectors).

Petition – Charges – Evidence – Whether union allegation that originators of petition had undue influence because they were perceived as management constitutes an allegation of improper conduct by management – Effect of persons perceived as management originating the petition – Whether union must give notice that it will allege that originators of petition were perceived as management – Rule 47.

Effect of petitioners evidence appearing very defensive.

Effect of signatories being told that purpose of petition was to obtain meeting with management – Effect of signatories not understanding the language of the petition – Effect of persons perceived as management threatening discharge if union certified – Effect of one of three petitions found to be unacceptable on the other two petitions.

BEFORE: M. G. Picher, Vice-Chairman, and Board Members O. Hodges and L. Hemsworth.

APPEARANCES: *Harold F. Caley and S. Powers for the applicant; Donald J. McKillop, Q.C., R. Klim and Bill Leathem for the respondent; Robin B. Cumine, Q.C., and Consiglio Demelio for the objectors.*

DECISION OF VICE-CHAIRMAN M. G. PICHER, AND BOARD MEMBER O. HODGES: September 24, 1976

2. This is an application for certification.

4. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in the Borough of Scarborough in the Municipality of Metropolitan Toronto save and except foremen and foreladies, persons above the rank of foremen and foreladies, office, sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. The Board finds that there are 41 employees in the bargaining unit described. The applicant filed 25 membership documents by the terminal date. In these circumstances the Board would normally certify the applicant pursuant to section 7(3) of the Act.

6. In this instance, however, three statements of desire were filed with the Board listing the signatures of some 25 persons purporting to be employees of the respondent company, who were opposed to the certification application. The statements of desire took the form of three petitions, bearing 15, 5 and 5 signatures respectively, each signature being dated and witnessed. Seven of the signatures appearing on the statements of desire correspond to names included in the membership evidence, thereby making it necessary for the Board to inquire as to the circumstances surrounding the origination, preparing and circulation of the petitions. If they are found to be a voluntary expression of the true wishes of the employees who signed them, then it will cast sufficient doubt upon the membership evidence submitted by the applicant as to cause the Board, following its normal practice in such cases, to order a representation vote pursuant to section 7(2) of the Act.

7. Form 5, *Notice to Employees of Application for Certification and of Hearing* was posted on the respondent's premises at 10:30 a.m., July 9, 1976. That form contains notice of the procedure whereby employees may formally object to the certification application and the time limits for those procedures. The statements of desire filed in the instant case comply with those procedures and time limits. Paragraph 7 of Form 5 states:

"Any employee, or group of employees, who has informed the Board in writing of his or their desire in accordance with paragraphs 4 and 5 may attend and be heard at the hearing in person or by a representative. Any employee or representative who appears at the hearing will be required to testify or produce a witness or witnesses who will be able to testify from his or their personal knowledge and observation, as to (a) the circumstances concerning the origination of the material filed, and (b) the manner in which each of the signatures was obtained."

8. The petitions in this case each have the following preamble:

"We the undersigned employees of Dad's Cookies Limited do not wish to be represented for collective bargaining purposes by Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union 647 and hereby revoke (sic) any application for membership in such union which we may have signed".

9. Three employees of the respondent company appeared before the Board to give evidence as to the circumstances surrounding the origination, preparing and circulation of the petition.

10. The first witness on behalf of the objectors was Mrs. Consiglio Demelio, who described herself as an employee with some fifteen years' experience with the respondent company, who has been a lead hand for the past two years. She testified in response to questions by the Board that the petitions were her idea and that she decided to resist the union's certification when she saw the Form 5, *Notice to Employees*, described in paragraph 6 supra, commonly known as the "green sheet", posted on the company premises. She stated that

prior to that time she was not aware of the union's organizing campaign. She said that after seeing the notices she discussed with her husband and nephew what she should do to oppose the application and that her nephew recommended a lawyer who could advise her. She stated that her nephew is an accountant whose opinion she values and that she called him over to her house to advise her. When she contacted the lawyer he recommended, she was referred to another lawyer and she then arranged to see him. On cross-examination by counsel for the union, when she was confronted with the fact that the Form 5, Notice to Employees, was posted on July 9, 1976 at 10:30 a.m. and that she had her first appointment with her lawyer the afternoon of that same day she changed her testimony, saying that she had in fact talked with her husband by telephone, that she punched out at noon hour, and that on her way home that afternoon she stopped by her nephew's home for his advice. Her final comment on these events, which had occurred some 15 days prior to her testimony, was that her memory was very weak.

11. Mrs. Demelio testified further that she obtained from her lawyer the three copies of the statement of desire filed herein on Friday, the 9th of July, and that over the next four days she, Dora Andreades, who is the other lead hand for the company, and Frank Sarcinella, a production line worker, obtained the signatures appearing on the petitions. She stated that she telephoned a number of employees on the evening of the 9th, during the weekend following and on the evening of Monday, the 12th to discuss the petition and solicit their support. She and Frank Sarcinella went to the homes of some 20 of the signatories to obtain their signatures, while four more including Frank Sarcinella and herself, signed at her house. These signatures appear on two petitions, containing 15 signatures and 5 signatures respectively, being petitioners 6 through 25 according to the Board's numbering.

12. The Board is satisfied that these two petitions remained within the custody of Mrs. Demelio and Mr. Sarcinella until they were returned to counsel for the objectors. The Board accepts the testimony of Mrs. Demelio that she did not discuss the petitions with employees during working hours or on company premises.

13. The third petition was given to Dora Andreades on Saturday, July 10, and remained in her custody until the 13th, when it was given to counsel for the objectors along with the two other documents. According to the testimony of Mrs. Demelio, it was the intention of the objectors that Dora Andreades should solicit the employees who spoke Greek, while she would canvass the Italian-speaking employees.

14. Dora Andreades was the second witness called on behalf of the objectors. She stated that she obtained and witnessed all five of the signatures P1 through P5 in the homes of the employees in question after each of them had telephoned her at her home and indicated their desire to sign the petition. On questioning by the Board, she admitted that she cannot read English nor can any of the employees whose signatures she obtained and that neither she nor they were able to read and understand the preamble to the petition. When asked what she told the employees the document meant, she stated that she advised them that its purpose was to enable the employees to have a meeting with the company management. She further stated that she did not advise the employees who signed that the purpose of the document was to prevent the union from representing them.

15. The Board heard extensive evidence from both the objectors and the union, going into the nature of the work performed by Consiglio Demelio and Dora Andreades. It is

common ground that there are normally two shifts in the respondent company's plant, day and night, and that these two ladies are normally assigned one to days and the other to nights on a weekly rotation and that their duties are the same. The objectors sought to establish that these persons are referred to as lead hands and the union sought to show that they are more commonly referred to as "foreladies" by the employees. There is little dispute in the evidence as to their duties, which consist principally of supervising the rotation of the employees every two hours or so on the production line, when they move to different positions to perform different tasks. When an employee fails to take his or her proper place in the rotation or where there is some dispute as to what that place is, these ladies settle the question and order an employee to his or her proper position, if needs be.

They also take the place of employees on the assembly line while the latter take their coffee breaks on rotation and replace employees on the line when they must leave their posts for whatever reason.

They do not appear to the Board to have the authority to hire, fire or discipline employees. When there is need for extra help it is they who call employees at home to offer them the overtime work, using a list provided by management, and calling the employees, according to Mrs. Demelio, on a seniority basis. They are the closest thing to authority figures working consistently on the plant floor. The undisputed evidence is that the foremen rarely work on the production line and are usually in an adjacent office.

Both of these ladies appear to be conduits between the employees and management. The Board accepts the evidence of Dorothy Simitsis and Pskalia Petridis, who testified on behalf of the union that when an employee requests to leave work early he or she asks these ladies and that they take the request in to the office to the foreman, who appears to make the decision. The Board also accepts the evidence of these two witnesses that the employees refer to Dora Andreades and Consiglio Demelio as "foreladies".

16. Counsel for both the objectors and the respondent raised objections to the union presenting evidence tending to establish that these two objectors have managerial functions. Their position, which appears to the Board to be a common position, was two-fold. Firstly, they argued, if the union intends to adduce evidence that tends to show that they perform managerial functions or are, in fact, "foreladies", pursuant to section 47 of the Rules of Procedure, it is required to first provide particulars of the facts it intends to prove, since it would be alleging improper conduct by such managerial persons and, by extension, the employer. Secondly, they urged that the union could not have it both ways, namely that these persons be seen as employees for the purposes of inclusion in the bargaining unit and as managerial for the purposes of discrediting the voluntariness of the statements of desire. Specifically they moved that the Board adjourn and order the union to provide particulars of any facts intended to be proved that should show these ladies to be managerial before resuming the proceedings. They further moved that the Board appoint a special Examiner to inquire into the nature of the duties performed by Dora Andreades and Consiglio Demelio.

17. We denied both motions. The Board does not consider that the union breached section 47(1) of the Rules of Procedure or that this is an appropriate case for appointing a special Examiner.

Section 47(1) of the Rules is as follows:

“Where a person intends to allege, at the hearing of an application or complaint, improper or irregular conduct by any person, he shall,

(a) include in the application or complaint; or

(b) file a notice of intention that shall contain,

a concise statement of the material facts, actions and omissions upon which he intends to rely as constituting such improper or irregular conduct, including the time when and the place where the actions or omissions complained of occurred and the names of the persons who engaged in or committed them, but not the evidence by which the material facts, actions or omissions are to be proved, and, where he alleges that the improper or irregular conduct constitutes a violation of any provision of the Act, he shall include a reference to the section or sections of the Act containing such provision”.

18. In the instant case the applicant union has not alleged any improper conduct on the part of the employee nor of any of the objectors. The union has made it no part of its case that these two ladies are *in fact* foreladies within the normal meaning of that term. The union has not sought to establish that these persons were a part of management. Rather it has sought to prove that they are perceived by the company's employees as being sufficiently close to the seat of managerial authority as to cast doubt on the voluntariness of statements of desire that purport to express the employees' free wishes.

There have been no charges filed against either the employer or the objectors. The union alleges no wrongdoing, nor does it rely on any wrongdoing to make its case against the objectors.

Clearly the view of a special Examiner or ultimately of this Board as to whether or not these two individuals are in fact a part of management is irrelevant so long as the union is entitled, as it is, to restrict its case to the *appearance* of managerial authority in these two persons in the eyes of the employees. The eyes of a special Examiner can add little or nothing to that inquiry. This situation is to be distinguished from that part of a certification proceedings where the issue of whether a person is in fact exercising managerial functions for purposes of defining exclusions from the bargaining unit frequently justifies the appointment of a special Examiner to assist in the making of that final determination by the Board.

19. In the latter inquiry the Board is concerned with objective reality, i.e., determining the actual nature and quality of a person's duties to determine whether they are in fact managerial. In the instant inquiry the Board is concerned not with the absolute fact of their duties, but with the more relative fact of the reasonable impression of the employees as to the nature and quality of the duties of these two ladies. The two types of inquiry are not of the same order. The inquiry as to whether one is in fact managerial requires a determination that must often take account of a number of factors, each of which may involve great detail. This frequently justifies the appointment of a special Examiner since the adversarial hearing alone is often not the most appropriate method of fact finding in the circumstance. However, where the inquiry is merely as to the impression that is reasonably held by a group of employees with respect to the relative authority of one or more persons, quite apart from what their actual authority might be, *viva voce* evidence from those employees at the hearing will normally provide the Board with evidence sufficient for that purpose.

20. That is so in the instant case. The Board is not satisfied that the marginal assistance, if there be any, of the report of a special Examiner would be justified in light of the usefulness of such an inquiry and the cost and delay that it would cause. Counsel for both the objectors and the respondent company argued strenuously that in denying the motion for an adjournment for particulars and to appoint a special Examiner the Board was in breach of the rules of natural justice. In *Nick Masney Hotels Ltd.* [1970] 70 CLLC 14,020 the Ontario Court of Appeals was, in somewhat different circumstances, faced with the argument that the denial of an adjournment in proceedings such as these was a breach of natural justice. In delivering the unanimous decision of the Court Laskin J. A. stated:

“ This Court cannot say, as Addy, J. could not say, that the refusal of an adjournment to the employer in the present case amounted to a denial of natural justice. The Ontario Labour Relations Board deals in certification matters with fluid situations which cannot be judged by the more leisurely standards that operate in the prosecution of a claim for damages, for a tort or for a breach of contract where the situation is fairly frozen when the tort or the breach of contract has occurred. Expedition is important to a union, to employees and to an employer since the certification is merely the first step in an often laborious collective bargaining process”.

21. Having regard to the totality of the evidence, and without finding whether the two ladies in question are sufficiently managerial as to be excluded from the bargaining unit, the Board is satisfied that they were reasonably perceived by the employees of the respondent as being in the nature of a “boss” albeit in a qualified sense, and that they were in a relationship of proximity to the respondent that set them apart from all production line employees in the plant. In this regard the Board accepts the testimony of the employee Dorothy Simitsis that on one recent occasion when she wanted to change shifts between day and night when she approached the foreman Vitto for permission to do so, he stated: “Don’t ask me, you have to ask your forelady”. She also testified that she talked with Dora Andreades and Consiglio Demelio on a friendly basis about possible raises because, as she put it: “They know what’s going on”, and later in her testimony she said: “Dora knows everything about the company”. The Board notes this testimony not as proving that in fact either or both of these ladies did know things that were closely held by management but as satisfying the Board that, in the eyes of the employees at least, they were perceived as having such knowledge or an access to such knowledge that other employees did not have.

22. Dorothy Simitsis further testified that on the day the Notice to Employees described above was posted a meeting took place in the foremen’s office, and that Dora Andreades emerged from that meeting and went directly to the production line where she shouted in anger at the employees, asking why they wanted a union when the company had been good to them, and then stating with great agitation that if the union came into the plant the employees would go out, “Not out the doors, but out the windows, like rabbits”.

She testified at first that Consiglio Demelio was present at the meeting in question, but under cross-examination by counsel for the respondent employer when confronted with a time card that purported to indicate that Mrs. Demelio had punched out during the noon hour of that day to meet with her lawyer and therefore was not in the plant at the time of the meeting, she stated that she could not be certain that Mrs. Demelio had been there. For reasons best known to himself counsel for the company did not enter that time card in

evidence. The Board is satisfied that Dora Andreades did attend the meeting in question and did utter the words attributed to her immediately thereafter. This part of Dorothy Simitsis' testimony remained unshaken. The Board finds that Consiglio Demelio was not then present, although the matter is not without doubt in view of the conflicting testimony that she gave as to exactly when she first met with her lawyer, as related in paragraph 10, *supra*.

23. In summary, Counsel for both the objectors and the company raised objections to the union bringing evidence of the meeting in the foremen's office without having first provided particulars of that event pursuant to Rule 47(1). They moved an adjournment pending such particulars. The motion was denied by the Board. The union is entitled to proceed without making charges against either the company or the objectors. It follows that it is entitled to prove the meeting in question, quite apart from and without making any allegation of wrongdoing, for the sole purpose of establishing the perception of the employees that the lead hand might well have been inspired (if not directed) by management to say what she did and to be a leading force in the ensuing petition drive. As the union has presented its case it is not an issue before the Board what was said or done in that meeting. The issue is what resulting impression was caused among the employees by Dora Andreades' outburst immediately following that meeting. The meeting may in fact have been entirely innocent, and this Board is not prepared to require not to expect the union to file serious charges against the company and individuals on such slim circumstantial evidence alone. Nor, in this instance, where no charges have been filed and no wrongdoing is relied upon by the union, is there any resulting prejudice to the employer or the objector. If an adjournment were granted to provide particulars and the objectors and the company were subsequently able to prove beyond a shadow of a doubt that the meeting was entirely innocent it would not make a jot of difference to the case before the Board. Nor did counsel for the objectors and the employer indicate that they wished an adjournment in order to prove that the meeting in question never took place. In these circumstances no good reason for an adjournment nor for particulars was made out.

24. The vigilance of this Board upon inquiries into the voluntariness of petitions is well established. The following passage from *Morgan Adhesives of Canada Ltd.* [1975] OLRB Rep. Nov. 813 at 818 well expresses the reasons for this vigilance.

"There is a natural suspicion which attaches to a statement of desire following closely upon a union organization campaign. The Board must assure itself that the "change of heart" indicated by employees who sign the petition in opposition to the union after having indicated support for that same union is a free choice unimpeded by overt or subtle pressures. The rationale giving rise to this suspicion is well summarized in the *Pigott Motors (1961) Ltd.* case, 63 CLLC 16, para. 16,264, where the Board stated:

"...In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act. *It is precisely for this reason* and because the Board has discovered in a not inconsiderable number of cases that management has improperly in-

hibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence in a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories”.

(emphasis added)

The burden of proving that, on the balance of probabilities, the statements of desire filed represent the voluntary expression of the employees who signed lies upon the objectors. *Leamington Vegetable Growers' Co-Operative Limited*. [1974] OLRB Rep. June 402 at 403.

The Board finds on the totality of the evidence that the objectors have not discharged that burden. In the instant case the Board notes a number of facts, which taken individually might not of themselves cast sufficient doubt upon the voluntary nature of the documents, but which, when they are viewed cumulatively, cause the Board to doubt whether the statements are voluntary.

25. Firstly, the demeanour of the witnesses Consiglio Demelio and Frank Sarcinella. Their inability to recall the events of two weeks prior with any exactness raises some doubt. Specifically both of them indicated that their concern about opposing the union began when the Notice to Employees was posted, and that following that they had telephone discussions about what should be done. When confronted with the fact they were out canvassing the employees in their homes with the documents prepared by the objectors' lawyer on the night of the day of the posting they became unsure of their recollection of those events. Similarly, Mrs. Demelio shifted ground on when and how she consulted with her husband and nephew and ended her testimony on this point by saying that she could remember. In view of the fact that the event in question had occurred only two weeks previous the posture of these witnesses on this point leaves room for doubt and suggests some defensiveness, if not evasion, about the facts touching on the origination of the petition.

Defensiveness is suggested also in the way Mrs. Demelio insisted that she is called a lead hand in the plant. When Frank Sarcinella was asked in cross-examination how Mrs. Demelio is referred to daily in the plant by the employees he was unable to summon up the words “lead hand” without prompting from the Board after a long hesitation. The Board may fairly doubt this testimony when the term is alleged to be used regularly in a plant where the witness has worked for the past five years. The Board accepts the evidence of the witnesses for the union that both Consiglio Demelio and Dora Andreades are commonly referred to by the production line employees as “foreladies”. We reject the explanation of Mr. Sarcinella that the references to them as foreladies are made jokingly.

The Board concerns itself with this part of the evidence, not because anything turns on whether these persons are called foreladies or lead hands, but because the posture taken on this issue by the objectors appears overly defensive and, bearing in mind that they have the burden of proof, it tends to diminish the weight of their testimony generally.

25. Secondly, whatever may be the actual authority of Mrs. Demelio and Dora Andreades, the Board is satisfied that they are viewed by the employees in the plant as being in

greater proximity to managerial authority than other employees. The concern of the Board in the instant case is the same as was expressed in *Trench Electric Ltd.* (Board File No. 1671-75-R) in the following terms:

“The Board is inherently suspicious of the voluntary nature of statements of desire which have been circulated by persons exercising even limited managerial authority and has held that where such a person is known by the employees in the bargaining unit as capable of affecting their employment relationship the statement does not reflect the voluntary wishes of the employees who sign it. (See *Link Manufacturing Ltd.* case [1954] Board File No. 48682-53-R, *Leamington Vegetable Growers Co-Operative Limited* case [1974] OLRB Rep. June 402).

26. A third cause for doubt arises in this case in light of the testimony of Mrs. Demelio and Frank Sarcinella that they told each signatory before he or she signed that one purpose of the petition was to obtain a meeting with management so that matters could be discussed without a union. An employee hearing such a suggestion coming from a lead hand might reasonably suspect that there had been some prior approach to management by that person and that management might be aware of the petition. In this regard the Board notes that the meeting with management was the only purpose stated by Dora Andreades in her approach to employees, none of whom could read the English preamble. In a circumstance such as this, the Board's inevitable concern is that the freedom of an employee to express his true wishes may be inhibited to the extent that he knows or reasonably expects that the petition that he signs will be presented to management. In the recent case of *Genwood Industries Ltd.* (Board File No. 0576-76-R, Aug. 23, 1976) the Board rejected a petition where its sponsors categorically told the signatories that their first intention was to present the document and signatures to the employer. There the Board was constrained to doubt the voluntariness of the document which it described, quoting the words of *Peel Block Co. Ltd.* case [1963] 63 CLLC 16,277 at 1157) as,

“...reasonably and likely to be construed by the employees as an open invitation to proclaim their loyalty to their employers by signing the petition”.

In the instant case there is no suggestion that either Dora Andreades, Consiglio Demelio or Frank Sarcinella told the employees that the petitions would find their way to the employer's eyes. Nor need the suggestion of some eventual meeting with management necessarily be fatal to the voluntariness of the signatures. It does, however, raise the possibility that some employees approached might have formed the impression that if one object of the petition was to obtain a meeting with management that it and the signatures upon it would indeed be presented to the employer. The danger of that obviously greater where the signatures collected by Dora Andreades are concerned, since a meeting with management was the only purpose that she alluded to. On the whole these facts in the instant case are not so conclusive as were the facts in the *Genwood Industries Ltd.* case where the employees knew beyond a doubt that the petition would go directly to their employer. The Board need not decide whether the suggestion of a meeting with the employer by the petitions' sponsors would be enough to cause it to reject the petitions. We raise this aspect, however, to say that, viewed in the context of all of the evidence and the cumulative impact of that evidence, it can hardly assist the objectors.

Fourthly, the Board must reject outright the petition gathered by Dora Andreades for the sole reason that neither she nor any of its signatories knew the meaning of the words written upon the paper which they signed. In explaining the document to the employees who signed, she told them only that its purpose was to obtain a meeting with management. She did not tell them, nor did they know so far as the Board can determine, that the purpose of the petition was to prevent the union from representing them. If the petition were a contract they would in all likelihood be entitled to plead *non est factum*, arguing that the preamble in no way represents their understanding of what the document meant.

The Board provides the widest latitude for the expression of the wishes of employees and has entertained petitions written in languages other than English (see, e.g., *Cooper-Weeks Ltd. [1967] OLRB Rep. Nov. 767* and *Genwood Industries Ltd., supra*). Nor is there any apparent reason why the Board should not admit into evidence a written statement of desire expressed in English and signed by persons who are illiterate or who are unable to read English provided that evidence is adduced to satisfy the Board that the person signing was made to understand the full and true meaning of the document presented to him. That is not the case with the petition bearing the signatures P1 through P5 gathered by Dora Andreades. As was conceded by counsel for the objectors it must be rejected as being in no way probative of the desire of the employees who signed it to indicate that they do not wish to be represented by the applicant union. Because that petition contained only one signature corresponding to membership evidence of the applicant its disqualification does not end the Board's inquiry respecting all of the statements of desire.

27. Lastly, the Board must be concerned about the evidence of Dorothy Simitsis, not challenged in cross-examination by the objectors, that on the day that the "Notice to Employees" in Form 5 was posted the lead hand Dora Andreades emerged from a meeting in the foremen's office and immediately launched an angry verbal attack upon the employees on the production line, telling them that if the union came in that they would be put out "by the windows". Now it is common ground that this lead hand did not have the authority to put anyone out. In that circumstance it would not be unreasonable for the employees to form the impression that the lead hand, who was a conduit for much communication between employer and employees, was relating something that had been expressed to her by management.

28. The Board makes no finding that in fact the foremen either instructed or inspired the lead hand to speak as she did. The testimony respecting the meeting immediately prior to Dora Andreades' statements was tendered by the union and admitted by the Board solely for the purpose of proving what impression might have been created in the minds of the employees who heard her remarks. There is no evidence before the Board as to who those employees were, save Dorothy Simitsis, and the Board cannot be satisfied that there are not among the signatories of the statements of desire employees who were then present or who otherwise learned of that incident.

29. Standing alone this incident might well cast sufficient doubt on the voluntary nature of all three statements of desire. Coming as it does in the light of all of the doubts raised in the evidence heretofore canvassed it is the straw that breaks the already burdened back of the objectors' case. They have failed to satisfy the Board that the statements of desire filed are voluntary and untainted by a reasonable fear in the minds of the signatories for their own employment relationship.

30. Counsel for the objectors suggested that any cloud on the petition gathered by Dora Andreades should not affect the merits of the two petitions which were gathered by Consiglio Demelio with the assistance of Frank Sarcinella. As indicated above, the latter two statements of desire bore sufficient signatures to defeat the union's application.

31. The Board is of the view that, in so far as the disqualification of the Andreades petition is based on the failure of those who signed it to know what they were signing, counsel's suggestion is well founded. That short-coming does not relate in any way to the other statements of desire. However, the Board is equally persuaded that Dora Andreades' statement to the employees on July 9th, 1976 is relevant to impeach the voluntariness of the signatures on all three petitions. It is clear that the sponsors of all three documents were engaged in a common enterprise. And only hours after the first of two lead hands made her threatening statement the second lead hand was soliciting the employees to sign a document that would prevent the day of retribution that had been so vividly described. The Board has no way of knowing that the employees in both instances were not the same and the objectors, upon whom the burden lies, have adduced no evidence to avoid the reasonable inference that at least some might be.

32. After the testimony of Dorothy Simitsis, counsel for the objectors requested an adjournment of the hearing to permit him to gather reply evidence. The Board denied the adjournment. Bearing in mind that in a certification application that is closely contested, lengthy delay may be as good as victory for an employer or objecting employees, the Board will not grant an adjournment, without consent of the parties, unless some compelling reason for doing so is made out. In the instant case it was open to the objectors to recall Dora Andreades to rebut the unchallenged evidence respecting her threatening statements. If she was not at that moment available to do so that fact is a deficiency in the objectors' case. The Board in the past has steadfastly refused to permit a party to shore up its case late in the day when that can only be done at the risk of delay that may be costly, if not fatal, to the collective bargaining process. It was common ground that any adjournment would have delayed the instant application for as much as two months. We find the following comment of the Board in the *Trench Electric Limited* case (*supra*) to be especially appropriate to these circumstances:

“ The Board has ruled in a number of decisions that the onus of making witnesses available in these matters rests with the objectors. (See *Sentry Stores* case [1968] OLRB Rep. 849, *Willow Press* case [1971] OLRB Rep. Feb. 59, and *Formosa Spring Brewery* case [1974] OLRB Rep. Oct. 696. The Board does not grant adjournments nor will it consider a decision for the purpose of permitting a party to repair the deficiencies of its case where the deficiency is caused by the non-appearance of a witness who could have been subpoenaed by the party requiring the adjournment. If such were the practice certification proceedings before the Board would be interminable with resultant prejudice to the applicant trade union and its constituent members”.

33. For all of the reasons stated the Board finds that the objectors have failed to establish on the balance of probabilities that the statements of desire filed represent the voluntary expression of the wishes of the employees.

34. The Board is satisfied that on the basis of all the evidence before it that more than fifty-five percent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on July 14, 1976, the terminal date fixed for this application and the date the Board determines under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

35. A certificate will issue to the applicant.

DECISION OF L. HEMSWORTH:

1. I dissent.

2. This is, in my opinion, a further example of the Board going to extreme lengths to deny employees their right to a free and democratic vote as a means of determining whether a majority desire or do not desire to deal with their employer through a third party.

3. Once again the Board, despite stringent cross-examination of untutored, guileless, and sometime inarticulate shop floor employees by skilled inquisitors, has failed to uncover any evidence whatsoever of employer encouragement or influence in the origination, preparation or circulation of these employee petitions opposing union certification. To outlaw the petitions – the acceptance of which would have merely permitted a secret ballot vote – the Board has had to rely on a nebulous something it characterizes as the “cumulative impact” of facts, none of which by themselves, in the words of the Board “...cast sufficient doubt upon the voluntary nature of the documents...”.

4. This decision, along with many others, reflects a most casual concern on the part of the Board as to the results which flow from its decisions. The Board’s concern, at this point in time, seems to be merely to find earlier cases on which it may rely to support certification. It fails to ask itself, in my experience, the vital question, “Is the union in a position to truly represent the views and wishes of the employees...or at least a majority of them?” The mere issuance of a certification under the Board’s present rules does not, in my opinion, answer this...the only essential question to the whole proceedings.

5. When a group of employees and their employer are left with the suspicion, or indeed a conviction, that the union does not have majority support, chaos rather than orderly collective bargaining is more likely to flow from the Board’s decisions.

6. This has to be, I would say, manifestly the most serious indictment against an Administrative Agency whose role is to eschew or allay industrial conflict.

7. It is time the Board abandoned its ritualistic approach and concerned itself with granting bargaining rights only in those cases where there is unequivocal evidence that a majority of employees, exercising their democratic right to make their wishes known in secret, have indicated their desire to be represented by a third party in their dealings with their employer.

8. I would have allowed a secret ballot vote.

0308-76-R Canadian Chemical Workers Union, (Applicant), V. **Canadian Rexall Corporation**, (Respondent), V. International Chemical Workers Union and its Local 279, (Intervener).

Successor Status – section 54 – Effect of International imposing a trusteeship on a local before the local's officers attempted disaffiliation so as to enter into a merger with the applicant – Whether new disaffiliated local retains bargaining rights.

BEFORE: D. H. Kates, Vice-Chairman, and Board Members H. J. F. Ade and E. Boyer.

APPEARANCES: *D. Ublansky and R. Pratt for the applicant; T. F. Storie and E. Baker for the respondent; A. Ryder for the intervener.*

DECISION OF THE BOARD: September 14, 1976

1. This is an application under section 54 of the Act for a Board declaration that by reason of a merger, amalgamation and transfer of jurisdiction "The Canadian Chemical Workers Union has acquired the rights, privileges and duties of its predecessor Independent Chemical Workers Union, Local 279". Section 54 of the Act reads as follows:

Section 54

(1) Where a trade union claims that by reason of a merger or amalgamation or a transfer of jurisdiction it is the successor of a trade union that at the time of the merger, amalgamation or transfer of jurisdiction was the bargaining agent of a unit of employees of an employer and any question arises in respect of its rights to act as the successor, the Board, in any proceeding before it or on the application of any person or trade union concerned, may declare that the successor has or has not, as the case may be, acquired the rights, privileges and duties under this Act of its predecessor, or the Board may dismiss the application.

(2) Before issuing a declaration under subsection 1, the Board may make such inquiry, require the production of such evidence or hold such representation votes as it considers appropriate.

(3) Where the Board makes an affirmative declaration under subsection 1, the successor shall for the purposes of this Act be conclusively presumed to have acquired the rights, privileges and duties of its predecessor, whether under a collective agreement or otherwise, and the employer, the successor and the employees concerned shall recognize such status in all respects.

2. The background circumstances precipitating this application are somewhat involved and ought to be briefly reviewed. The Rexall Drug Company (hereinafter referred to as "the respondent company") is a party to a collective agreement dated April 2, 1975 with Local 279, International Chemical Workers' Union (hereinafter referred to as "the International"). The collective agreement covers all employees of the respondent company at its plant in Mississauga, Ontario. Of peripheral importance to the disposition of the issues arising out of the application is the reference in the collective agreement to a union agency

provision and a voluntary authorization of dues check-off provision related thereto. At all material times the terms and conditions of employment of employees affected by this application are governed by the provisions of this agreement whose expiry date is February 2, 1976. More particularly the Duration Clause reads as follows:

ARTICLE XX

Duration

20.01 The Agreement shall continue in full force and effect on both parties until February 2, 1977 and shall continue automatically thereafter for annual periods of one year unless either party notifies the other in writing not less than thirty days and not more than sixty days prior to the annual expiration date that it desires to amend or terminate the Agreement.

DATED at Mississauga, Ont., this 2nd day of April, 1975.

Rexall Drug Company

Signed _____
A. J. English

Signed _____
E. Baker

International Chemical Workers' Union, Local 279

Signed _____
E. Fitzroy

Signed _____
L. Palumbo

Signed _____
F. Peters

Signed _____
R. Bonspiel

Signed _____
D. Neff

Signed _____
W. Adams

There is no dispute that the rights, privileges and duties sought to be acquired by the applicant as successor are clothed in the collective agreement referred to herein.

3. The applicant asserts in its application that at the material time of the merger "the predecessor" holding the bargaining rights referred to above was "The Independent

Chemical Workers Union, Local 279" (hereinafter referred to as "the predecessor". At the root of the dispute raised by the parties to this application is the legitimacy of this assertion; namely, that the predecessor is the incumbent bargaining agent of the employees covered by the collective agreement. The basis for this claim may be outlined as follows. Apparently on October 23, 1975 approximately six representatives and officers of the International Local 279 were discharged from office by their superiors in Akron, Ohio. Difficulties with respect to the administration of the trade union and the servicing of the membership ensued because of the shortage of manpower resulting from the discharges. As events took their course dissatisfaction amongst the membership with respect to the quality of representation began to find expression. The growing criticism directed towards the International was in no small way enhanced by the dissident officers who had just been terminated. In any event, Mr. Bonspiel, the former Vice-President and chief steward of the International Local 279, testified that after the firings exploratory efforts were being made amongst the membership with respect to continued representation by the incumbent. These efforts apparently culminated in early January, 1976 in the circulation of a petition indicating that the signatories thereto "wish to withdraw and disaffiliate the International Chemical Workers Union, Local 279 from the International Chemical Workers Union".

4. Apparently the persons signing the petition were employees engaged by the respondent at its Mississauga warehouse and by employees of the respondent's related company, Zochem Limited. The evidence shows that in June, 1976 the applicant displaced the incumbent Local 279 of the International as bargaining agent of employees of Zochem upon a successful application for certification (see; Board File No. 0206-76-R). Nevertheless during the months of January, February and March, 1976, a campaign to acquire signatures to the petition as aforesaid occurred whereby the opinions of employees of both the respondent and Zochem Limited were canvassed. Approximately 132 signatures were secured to the petition and the witnesses in most instances are shown to be ex-officials of the International or at least the signatories to the collective agreement referred to in paragraph 2.

5. The dissident officials of the International Local were evidently encouraged by the support secured as a result of the signatures obtained on the petition. After a meeting of the Executive Board it was resolved that the issue of continued affiliation with the International "would be taken to the people". The ostensible reason underlying disaffiliation was the objective of creating a Canadian trade union more responsive to the needs of the dissatisfied members. To the dismay of these dissidents the support extended their endeavours was by no means unanimous. Mr. Alex Toussia, an employee of some 13 years at the respondent's warehouse, was somewhat cautious about withdrawing from the International. Indeed, initially in November, 1975, he recommended that an approach ought to be made to the International before steps are taken to disaffiliate. At a later date during the course of the circulation of the petition Mr. Toussia spearheaded the opposition of approximately twenty members of the bargaining unit against these disaffiliation efforts. Notwithstanding the recalcitrance of what appeared to be a small faction within the membership the dissident members advised the employees by notices placed on company bulletin boards of a meeting to be held on March 8, 1976 at The Royal Canadian Legion in Mississauga. The purpose of the meeting was "to vote on the question of withdrawal and disaffiliation from the International Chemical Workers Union". The membership was also advised that the purpose of the meeting was also to include "...a vote on the question of a Local Union Constitution and By-Laws and a further vote on affiliation to The Canadian Chemical Workers Union".

6. The representatives of the International Chemical Workers Union in Akron, Ohio were by no means exhibiting a passive disinterest in the procedures adopted by the dissident faction who sought the dismemberment of Local 279. Mr. Thomas Sloan was requested to postpone his retirement and resume his position of Canadian Vice-President of the International following the terminations of the dissident executives and representatives. Mr. Sloan advised the Board that upon his advice, Mr. Frank D. Martino, President of the International imposed in accordance with Article VI, section 5 of the International Constitution imposed supervision and receivership over the Local Union 279. The letter advising of the trusteeship reads as follows:

"February 27, 1976

Ms. Evelyn Fitzroy, President
International Chemical Workers Local 279
1058 Westmount Avenue,
Mississauga, ON
CANADA

Ms. Lucille Palumbo, Recording Secretary
International Chemical Workers Local 279
883 Atwater Avenue
Mississauga, ON
CANADA

Ms. Denis Neff, Financial Secretary
International Chemical Workers Local 279
3125 Queen Frederica Drive, #202
Mississauga, ON
CANADA

Re: Imposition of Supervision and Receivership over International
Chemical Workers Union, Local 279

Dear Madam and Sisters:

This is to advise you that based upon the request and recommendation of International Vice President Thomas Sloan, and for good cause shown, in accordance with the authority vested in me by Article VI, Section 5 of the International Constitution and other applicable laws, I hereby impose supervision and receivership over International Chemical Workers Union, Local 279, effective immediately.

I have appointed International Representative William Mutimer as supervisor and receiver, and Canadian Director Research and Education James Phelan as deputy supervisor and receiver, to act as my representatives and agents in all respects relative to Local 279. Accordingly, only Supervisor Mutimer and/or Deputy Supervisor James Phelan are empowered to take control of all assets of this local union, including cash, funds in bank or banks, and all property of whatsoever nature and to administer all affairs of said local union including negotiating and policing of any and all contracts

when and as they deem necessary for the protection and welfare and best interest of the membership of the local union and this International Union.

You and other officers of Local 279 are instructed to cooperate with Supervisor William Mutimer and/or Deputy Supervisor James Phelan in carrying out their duties. All officers are reminded that they are bonded through a Surety Company and any past or future expenditure of funds not made in accordance with the Constitution may be made subject to a bond claim.

The authority for my action, as stated above, may be found in Article VI, Section 5 of the International Union Constitution, a copy of which is enclosed. You will note that under the provisions of the stated Article VI, Section 5, I am required to give my reasons for imposing supervision and receivership over the local union with 10 days.

The reasons include but are not limited to:

1. International Supervision was requested and recommended by International Vice President Thomas Sloan;
2. The local is attempting to disaffiliate;
3. My action is deemed necessary to assure performance of the collective bargaining agreement and other duties of the local union as a collective bargaining representative;
4. To otherwise assure that Local 279 carries out the legitimate objects of the local and the International.

Article VI, Section 5 of the International Constitution also provides that a local union may, if it so desires, appeal my action to the International Union Executive Board, provided such appeal is made in writing and submitted to the International Union Secretary-Treasurer within 30 days from the date of imposition of supervision. The International Constitution further provides that the local union may appeal the decision of the Executive Board to the next International Union Convention, if it is not satisfied with the decision reached by the International Union Executive Board.

I urge each and every officer, representative, and member of the local 279 to cooperate fully with my appointed agents in the carrying out of their duties.

With kindest regards and best wishes to the officers and members of Local 279, I am

Sincerely and fraternally,
Frank D. Martino, President"

In April, 1976 Mr. Sloan pursuant to the provision of section 73 of the Act made the necessary filings with the Board "setting out the terms under which supervision or control is to be exercised". The evidence further discloses that no attempt was made at any time material to

this application to challenge the legitimacy of "the trusteeship" either under the terms of the International Constitution or at law. A letter from Mr. Martino dated February 27, 1976 advised representatives and officers of the respondent company of the Imposition of the supervision over Local 279 and requested their co-operation with respect to the administration of the collective agreement.

7. Undaunted by the imposition of the trusteeship the dissident faction proceeded with its meeting scheduled for March 8, 1976. At this juncture the Board wishes it to be made clear that we reject any suggestion made in testimony that the predecessor's representatives were not properly informed of or were oblivious to the pall of doubt clouding their efforts as a result of the imposed trusteeship. At the outset of the meeting the evidence shows that attempts were made by Mr. Buchanan, an international representative, to address the approximately forty-five members in attendance. The meeting was chaired by Mr. Tom Blakely, the President of Local 279. Mr. Blakely refused to allow Mr. Buchanan permission to speak to the audience. Although it appeared that Mr. Blakely was in charge of the proceedings Mr. W. Adams, an ex-official of the International and an officer of the applicant Canadian Chemical Workers Union, led the opposition inhibiting Mr. Buchanan from speaking. Finally, the chaos and confusion created by the debate on Buchanan's status was resolved by the taking of a vote. Of the forty-five persons in attendance approximately five voted in favour of permitting him to take the floor. Mr. Buchanan left the meeting once having been denied the opportunity to speak. Mr. Alex Toussia was in attendance at this phase of the meeting and indicated he was thoroughly disgusted by the outcome.

8. The minutes taken of the meeting of March 8, 1976 conspicuously do not show the vote of the members with respect to Mr. Buchanan's status to address the membership. Nevertheless with business-like precision the minutes do show that within a short period of approximately 65 minutes matters of extreme significance were discussed and unanimously approved of by those in attendance. These minutes show the members to have;

- (a) approved the withdrawal and disaffiliation of Local 279 from the parent International;
- (b) approved a change of name of the organization for The International Chemical Workers Union Local 279 to The Independent Chemical Workers Union Local 279;
- (c) approved the adoption of a constitution "at the founding convention of" the Independent Chemical Workers Union, Local 279; and,
- (d) approved a resolution in accordance with the terms of the constitution authorizing "The Independent Chemical Workers Union Local 279 affiliate with the Canadian Chemical Workers Union".

9. The constitution adopted at that meeting shows by Article 1 that:

- 1. This organization shall be known as Independent Chemical Workers Union Local 279. *It shall be free to merge with, amalgamate or affiliate to or transfer to any other union or other body.*

Pursuant to this power and the authority reposed by the membership at the founding convention the representatives of "the predecessor" initiated proceedings to cause the merger with the applicant trade union to be brought about. At this juncture, it ought to be repeated, these efforts were apparently pursued in total oblivion to the superseding trusteeship.

10. Notice of a special meeting scheduled for May 11, 1976 was posted on the respondent's bulletin boards. The purpose of the meeting as set out in the notice will be "to discuss and vote on the question of merger with the Canadian Chemical Workers Union". Accordingly on May 11, 1976 with Mr. Adams and Mr. Ublansky in attendance on behalf of the successor trade union the minutes of the meeting show by vote of 28 to 4 membership approval of the merger proceeding. By letter dated May 28, 1976 Freda Peters, on behalf of Independent Local 279, formally applied for admission and acceptance of its members into the Canadian Chemical Workers Union. Enclosed was an application for a charter. On June 3, 1976 Mr. Stewart, President of the successor trade union, advised that the predecessor's application had been approved in accordance with its constitution and noted that a charter would issue in due course. Appended to that letter was the request "that all assets held by Independent Chemical Workers Union, Local 279 be transferred over to the new Canadian Chemical Workers Union Local". A charter is shown to have been granted on May 31, 1976 creating a new organization known as The Canadian Chemical Workers Union, Local 19.

11. In anticipation of the creation of the Independent Chemical Workers Union, Local 279, the Board had placed before us dues authorization slips dated in April, 1976, signed by approximately 90 employee members of the bargaining unit directing dues deducted under the terms of the collective agreement be channelled to the new Independent trade union. Overshadowing this dispute was a grievance filed by Local 279 of The International Chemical Workers Union against the respondent company with respect to these dues. The respondent upon being advised of the imposition of the trusteeship has placed the dues check-off in escrow and the monies are presently being held in a bank account pending the designation of the appropriate recipient of the funds. The grievance has since crystallized into a reference proceeding under section 96 of the Act with respect to the appropriateness of the ministerial appointment of a management nominee to an arbitration board. (See; Board File No. 6348-76-M). The parties agree that this latter issue is inextricably tied to a Board finding on the propriety of the merger proceedings.

12. The Board perceives that the fundamental difficulty obstructing the applicant from obtaining the declaration it seeks was the absence of any provision for merger or amalgamation in the constitution and by-laws of the parent International or its Local 279. In the absence of such provisions or a failure to take the necessary measures to amend the constitution to provide for this contingency, the Law of this Province dictates that the consent of each and every member of the incumbent union must be duly obtained in order to effect a merger with another trade union. This prerequisite is mandatory because the result of the merger of one trade union with another is to precipitate the extinction of the predecessor. In short, having regard to the contractual interest of each member in the incumbent organization, the demise of that organization through a merger cannot be achieved without the unanimous approval of the membership. (See; *Astgen et al v. Smith et al* 69 CLLC ¶14,198 (CA) at p. 800-1). The situation apparently facing the dissident faction in the autumn of 1975 was the necessity of formulating a strategy of circumventing the requirement for unanimity. The stratagem adopted was to effect the disaffiliation of Local 279 by its withdrawal

from the parent International. Once this had occurred it was then necessary to create a new organization couched with the authority to effect the merger with the applicant Canadian Chemical Workers Union. Therefore at the same meeting that the disaffiliation process was discharged, the membership thereupon (at the founding convention) caused Local 279 of the Independent Chemical Workers Union to come into being. The constitution adopted provided for the merger procedure that was so conspicuously lacking in the Constitution of Local 279 of the International union.

13. Prior to the disaffiliation process Mr. Sloan, on behalf of the International and at the behest of a group of members who opposed the dissident's strategy sought the help of the parent in Akron, Ohio. On February 27, 1976 Mr. Frank Martino in accordance with the power imbued the president of the International Chemical Workers Union placed Local 279 under supervision and receivership. No attempt was made to undermine the trusteeship for being *ultra vires* the powers of the International President under the constitution or at law. Mr. Sloan in April, 1976 filed with this Board the information required under section 73(1) of the Act with respect to the imposition of the trusteeship over Local 279. In short, there was nothing placed before this Board that would persuade us to hold that the suspension of the constitution and thereby the frustration of the dissident's efforts to achieve their ends was illegal or improper. (See particularly *Anderson et al v Amalgamated Clothing Workers of America et al* (1966) 67 CLLC ¶14,015 (Man Q.B.) at p. 64-65). Counsel for the successor argues in his written submissions that the imposition of the trusteeship was improper having violated the terms of the International constitution. Without setting out in detail the reasons cited in support of this position the Board simply is perplexed by the failure of any one member to take appropriate recourse to undermine the imposition of the supervision. It is not within our jurisdiction to question the propriety of the supervision save to the extent non-compliance with the provisions of this statute is shown to be relevant. In a like situation in *The Astgen et al v. Smith et al* case (supra) Laskin J.A. (at that time) notes that the imposition of a trusteeship for the purpose of effecting a merger (as opposed to frustrating as is the case herein) was not an unlawful transaction for a parent to assume until otherwise undermined by proof of a breach of the substantive or due process provisions of the relevant constitution. In that case the learned judge states (at p. 817):

"I do not think the constitution is impeachable in making a distinction between membership and holding of office so far as concerns the stipulation of a hearing before adverse action in the one case and after, in the other. Officers of a local union have an obligation to the total membership of the local as well as to the parent organization for the proper administration of the local's affairs in conformity with the constitution. This is clear from the terms of the Canadian Mine Mill constitution. In giving the national president power to remove local officers from their positions for alleged violation of their duty to the collectivity, subject to their right to have the validity of the removal determined in a hearing and subject to further rights of appeal, the constitution deals with such officers in their "public" responsibility not in their individual personal character; as members.

It deals with them, moreover, as agents of the local union and of the parent organization. *The possibility of unjust accusation and precipitate action by the national president must be weighed against the possibility of serious and perhaps irreparable harm, financial and other, to the stability of the local union. I do not*

see that legal principle is violated if on a balance of these considerations preference is given to the protection of the local union as against its officers in their capacities as such."

[emphasis added]

In short, we are of the view that the trusteeship imposed by the International president on February 27, 1976 was sufficient to nullify the efforts of the dissident faction to sever Local 279 from the International. As a result for the purposes of the disposition of this application we find the procedures adopted thereafter in effecting the merger were without lawful authority.

14. Although this finding is sufficient to dispose of the case the Board cannot refrain from commenting upon the apparent failure of the officials seeking to effect the merger to adhere to the legal requirements in achieving their goal. Counsel for the applicant suggests that Local 279 was in some fashion an autonomous entity that *per se* was a member of the International confederacy of trade unions. It therefore followed that such independent autonomy was retained both at the time of entering the confederacy and of withdrawing therefrom. In support of this position is cited Article XVI, section 1 of the constitution which permits existing trade unions to apply for a charter in the International. Nevertheless the terms of the charter once granted a local organization inextricably ties the local to the terms and conditions of the constitution. For example, Article I of The Uniform Local Union Constitution reads:

ARTICLE I – Name

This organization shall be known as International Chemical Workers Union, Local No. _____, of _____ (City), _____ (State or Province). It is chartered by the International Chemical Workers Union with full autonomy; *subject to the provisions of the Constitution of the International Chemical Workers Union, the Charter Contract, the mandates of the Conventions of the International Chemical Workers Union, and rules and regulations promulgated by the International President or International Executive Board acting under their Constitutional and legal authority.*

[emphasis added]

In other words whatever autonomy Local 279 may have held upon entering into the International confederacy (for which absolutely no evidence was adduced at the hearing) was lost subject to the rules of the International comity. For example both the International Constitution and the Local Constitution provide in the event of disbandment or disaffiliation the following:

ARTICLE XVI (Local Union Constitution)

Section 4. *No Local Union shall be disbanded or withdrawn by its own motion no matter where taken or how taken if ten (10) or more of its members evidence their desire to continue the said Local Union either by the continued payment of dues, notice to the International President or his representatives, orally or in writing, or in any other manner acceptable to the International President.*

ARTICLE XVII (International Constitution)

Section 5. *This Union shall not be disbanded or withdrawn by its own motion so long as ten (10) members in good standing favour continuance.*

[emphasis added]

At the membership meeting dated March 8, 1976 the evidence shows that the attempt made by Mr. Buchanan, the International representative, to address the membership was frustrated by the intercession of those who were simply predisposed to cause the ultimate merger with the Canadian Chemical Workers. The evidence further shows that there were indeed twenty members (and perhaps more) who did not agree with the merger strategy and who wished to remain affiliated with the International. Those members may very well have been denied any standing to cast a dissenting vote having regard to the conduct of the proceedings as described to us in evidence. And indeed it is interesting to note that persons such as Mr. Adams who assumed an active role at the meeting and who sought the objective of disaffiliation was at the same time an officer and representative of the Canadian Chemical Workers Union. Mr. Adams is also shown to have assumed a major role in quelling the attempts of Mr. Buchanan to put forward the International's position. The Board, having regard to the nature of those proceedings, is hard pressed to conclude an appropriate and legal dismemberment of Local 279 from the International transpired.

15. Even if we may assume that disaffiliation of Local 279 from the International was achieved, the Board is somewhat perplexed by the applicant's assertion that bargaining rights thereby reposed in the newly created Local 279 of the Independent Chemical Workers Union. In effect the dissidents were compelled to create a new trade union at its founding convention of March 8, 1976 because of the absence of any provision in the incumbent constitution for merger. What occurred was not simply a change of name of an existing organization pursuant to its rules and regulations. Rather the transactions that occurred were intended to create an independent organization equipped to achieve the ultimate goal of transferring bargaining rights through the vehicle of a legitimate merger. Yet there was no evidence adduced before us of any initial transaction demonstrating that a transfer of bargaining rights transpired between Local 279 of the International and Local 279 of the Independent Chemical Workers Union. In other words, the Board is somewhat troubled by the very assertion by the applicant of Independent Local 279's status to be deemed "the predecessor" trade union. Surely, even assuming a proper and successful withdrawal from the International, bargaining rights still remained with the incumbent trade union until such time as there occurred in accordance with the processes permitted by the Act a transfer of bargaining rights to the newly created Independent Local.

16. Finally, even assuming Independent Local 279 was the predecessor holding bargaining rights as the incumbent bargaining agent, the evidence adduced before the Board in satisfying us of the merger transaction was simply inadequate. In dealing with this phase of the case the Board wishes it to be noted that we have taken into consideration the procedural shortcomings raised by the intervener with respect to notifying "members" of the meetings in question. Nevertheless in disposing of this application we do not find it necessary to make any findings in this regard. What the Board does find necessary to elaborate upon is the total lack of knowledge and candor of the witnesses adduced by the applicant in support of its assertion of a legitimate merger transaction. Let us first examine the testimony of Mr. Bonspiel who was asked these questions in cross-examination:

question: Under what power and under what authority did you create a new trade union?

answer: I can't answer.

question: How many copies of the new constitution were distributed to the members?

answer: I don't know.

question: Did any member see the constitution before it was adopted?

answer: I don't know if any person saw the constitution before it was adopted.

question: Where is the charter of Local 279 of the International?

answer: I don't know.

question: Has it been surrendered?

answer: I don't know

question: Was there election of officers of the new trade union under its constitution?

answer: I don't believe so.

question: What has happened to the assets of Local 279?

answer: I don't know. I believe the bank account was frozen by the International.

question: What has happened to the minute book?

answer: I don't know.

In frustration counsel thereupon gave up continuing this line of cross-examination. Now let us examine the testimony of Mrs. Freda Peters, the President of Independent Local 279:

question: When did you first read the constitution?

answer: It was read by Bill Adams. The recording secretary was reading it and he was slow so Mr. Adams read it.

question: Who prepared it?

answer: How would I know that?

question: What ever happened to the international charter? Was it surrendered?

answer: You've got me there.

This was the nature of the testimony adduced by the applicant through its witnesses in support of its claim for a declaration of successor rights. The evidence that was adduced with

respect to the events described herein was as staged and as contrived as the pre-packaged argument prepared by counsel in advance of the evidence. To some extent the Board can appreciate the difficulties encountered by the representatives of the applicant in achieving the merger with the Canadian Chemical Workers Union that appears to be the desire of a vast number of the members of the bargaining unit. Nevertheless the applicant must still adhere to the requirements provided under law to achieve that end. The Board simply cannot countenance the methods employed to overcome the obstacles impeding the path to a merger that to all intent and purposes were calculated to stifle the wishes of the minority that sought to remain tied to the International.

17. As a result of the foregoing the application is dismissed.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING AUGUST 1976

Applications for Certification

BARGAINING AGENTS CERTIFIED DURING AUGUST

No Vote Conducted

1802-75-R: Local Union 1190, United Brotherhood of Carpenters and Joiners of America (Applicant) v. The Monty Group (Monty Construction Limited, P. Cipriano Construction Limited and S. Montemarano Construction Limited) (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit).

1906-75-R: Ontario Nurses' Association (Applicant) v. Trenton Memorial Hospital (Respondent).

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the respondent at Trenton, Ontario, save and except supervisors, head nurses, persons above the rank of supervisor and head nurse and persons regularly employed for not more than 24 hours per week." (82 employees in the unit).

Unit #2: "all registered and graduate nurses employed in a nursing capacity by the respondent at Trenton, Ontario, who are regularly employed for not more than 24 hours per week save and except supervisors, head nurses and persons above the rank of supervisor and head nurse." (42 employees in the unit).

1914-75-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Dominion Stores Limited (Respondent).

Unit: "all employees of the respondent in its retail stores at Sault Ste. Marie, Ontario, save and except store managers, assistant managers, persons above the rank of assistant manager, district office staff, persons employed for not more than twenty-four hours per week, persons employed during the school vacation period and persons covered by a subsisting collective agreement between the applicant and respondent." (2 employees in the unit).

0020-76-R: The Canadian Union of Public Employees (Applicant) v. Tri-Town Nursing Homes Limited (Respondent).

- and -

0021-76-R: The Canadian Union of Public Employees (Applicant) v. Tri-Town Nursing Homes Limited (Respondent).

Unit: "all employees of the Tri-Town Nursing Homes Limited at Kapuskasing, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, un-

dergraduate pharmacists, graduate dietitians, student dietitians, technical personnel, supervisors, persons above the rank of supervisor and office staff is a unit of employees of the respondent appropriate for bargaining." (57 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note* – see Report of full decision [1976] OLRB Rep. Aug.).

0092-76-R: Labourers' International Union of North America, Local 183 (Applicant) v. Mount Citadel Limited (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance at Mount Citadel, 701 Don Mills Road, Toronto, including resident superintendents, save and except property managers, persons above the rank of property managers, office and clerical staff." (2 employees in the unit). (*On the agreement of the parties*).

0141-76-R: Federation of Community Agency Staffs (Applicant) v. Browndale (Ontario) (Respondent).

Unit: "all employees of the respondent in the Haliburton region save and except househeads and those above the rank of househeads, office and clerical employees, Registered Nurse, and maintenance staff." (63 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note* – see Report of full decision [1976] OLRB Rep. Aug.).

0202-76-R: Ontario Nurses' Association (Applicant) v. The Corporation of the City of Kingston, (Rideaucrest Home For The Aged) (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity at the Rideaucrest Home For The Aged at Kingston save and except Director of Nursing and persons above that rank." (17 employees in the unit).

0482-76-R: The Canadian Union of Public Employees (Applicant) v. Glengarry Memorial Hospital (Respondent) v. Ontario Nurses' Association (Intervener) v. Group of Employees (Objectors).

Unit #1: "all employees of the respondent at Glengarry Memorial Hospital, Alexandria, employed in the service department save and except the Administrator, the Business Manager, the secretary to the Administrator, the Nursing Director, ward clerk-secretary to the Director of Nursing, Nursing Supervisors, Registered and Graduate Nurses, those persons above the rank of Department Heads, clerical and technical staff, all employees regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (44 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note* – see Report of full decision [1976] OLRB Rep. Aug.).

Unit #2: "all employees of the respondent at Alexandria employed in the clerical and technical departments save and except the Administrator, the Business Manager, the secretary to the Administrator, the Nursing Director, Ward Clerk-secretary/to the Director of Nursing, Nursing Supervisors, Registered and Graduate Nurses, those persons above the rank of Department Head, Service Staff, all employees regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (9 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note* – see Report of full decision [1976] OLRB Rep. Aug.).

0657-76-R: Labourers' International Union of North America, Local 183 (Applicant) v. Sam Sung Holdings Ltd. (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance at 25 Paisley Blvd., W., Mississauga, including resident superintendent, save and except property managers, persons above the rank of property manager, office and clerical staff." (2 employees in the unit).

0714-76-R: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. D. M. A. Masonry Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Ottawa – Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0715-76-R: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. De Marinis Constrn. Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Ottawa – Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0716-76-R: "Labourers' International Union of North America Local 607 (Applicant) v. Combustion Engineering-Superheater Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in the District of Thunder Bay, save and except non-working foremen, persons above the rank of non-working foreman and persons covered by a subsisting collective agreement between the Electrical Power Systems Construction Association and the Allied Trade Council." (3 employees in the unit).

0741-76-R: Teamsters Union Local 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Bigelow Canada Limited (Respondent).

Unit: "all employees of the respondent working in and out of Mississauga, save and except foremen, persons above the rank of foremen, office and sales staff and students employed during the school vacation period." (6 employees in the unit). (*Having regard to the agreement of the parties*).

0748-76-R: London and District Service Workers' Union (Applicant) v. The Willson Nursing Home Limited (Respondent) v. Group of Employees (Objectors).
- and -

0749-76-R: London and District Service Workers' Union (Applicant) v. The Willson Nursing Home Limited (Respondent) v. Group of Employees (Objectors).

Unit #1: "all employees of the respondent at St. Thomas, Ontario, save and except supervisors, persons above the rank of supervisor, registered nurses, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and office staff." (23 employees in the unit). (*Having regard to the above determination as well as the agreement of the parties*).

Unit #2: "all employees of the respondent at St. Thomas, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered nurses and office staff." (44 employees in the unit).

0755-76-R: Labourers' International Union of North America, Local 183 (Applicant) v. Greenwin Property Management (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance at 7 Capri Road, Etobicoke, including resident superintendents, save and except property managers, persons above the

rank of property manager, office and clerical staff.” (3 employees in the unit). (*Having regard to the agreement of the parties*).

0757-76-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Stacey Electric Company Limited (Respondent) v. Local 353 International Brotherhood of Electrical Workers (Intervener).

Unit: “all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (8 employees in the unit).

0773-76-R: Seafarers’ International Union of Canada (AFL-CIO-CLC) (Applicant) v. The Owen Sound Transportation Company Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent at the Ports of Tobermory and South Baymouth, Ontario in the classifications of docksman – Linesman and stockman – linesman, save and except managers, persons above the rank of manager, ticket agents, office employees and persons regularly employed for not more than twenty-four hours per week.” (24 employees in the unit). (*Having regard to the agreement of the parties*).

0779-76-R: Labourers’ International Union of North America, Local 183 (Applicant) v. ARSCO Investments Ltd. (Respondent).

Unit: “all employees of the respondent engaged in cleaning and maintenance at 1501 Woodbine Avenue, Toronto, including resident superintendents, save and except property managers, persons above the rank of property manager, office and clerical staff.” (3 employees in the unit).

0781-76-R: The International Union of Bricklayers and Allied Craftsmen Local 12 (Applicant) v. Alfred Grassing and Son Limited (Respondent).

Unit: “all plasterers and plasterers’ apprentices in the employ of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town off Burlington in the County of Halton, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

0782-76-R: United Brotherhood of Carpenters and Joiners of America Local Union 93 (Applicant) v. Metropolitan Stores of Canada Limited, 194 Sparks Street, Ottawa, Ontario (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the Regional Municipality of Ottawa – Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

0789-76-R: Labourers’ International Union of North America, Local 1059 (Applicant) v. Urban Consolidated Construction Corporation Ltd. (Respondent).

Unit: “all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman.” (10 employees in the unit).

0790-76-R: Service Employees Union, Local 204 Affiliated with AFL – CIO – CLC (Applicant) v. Chateau Gardens Niagara Inc. (Respondent).

Unit: “all employees employed by the respondent in Niagara-on-the-Lake, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, foremen, persons above the rank of supervisor or foreman, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (59 employees in the unit). (*Having regard to the agreement of the parties*).

0791-76-R: United Steelworkers of America (Applicant) v. Craft Construction Company (Respondent).

Unit: “all employees of the respondent at Sarnia, save and except foremen, persons above the rank of foreman, and office and sales staff.” (6 employees in the unit).

0792-76-R: United Steelworkers of America (Applicant) v. Pactin Metal Fabricators (Respondent)).

Unit: “all employees of the respondent working in and out of Pickering, Ontario, save and except foremen, those above the rank of foreman, and office and sales staff.” (3 employees in the unit). (*Having regard to the agreement of the parties*).

0794-76-R: Service Employees Union, Local 478 AFL-CIO-CLC (Applicant) v. The Chateau Nursing Home Cochrane Nursing Home Ltd. (Respondent).

Unit: “all employees of the respondent save and except department heads, persons above the rank of department head, professional medical staff, graduate and undergraduate nurses, supervisors, graduate and undergraduate pharmacists, graduate and student dieticians, technical personnel, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (26 employees in the unit).

0798-76-R: Canadian Paperworkers Union (Applicant) v. Hallmark Containers Limited and Hallmark Fibre Tubes Limited (Respondent).

Unit: “all employees of the respondent at Brampton, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (51 employees in the unit). (*Having regard to the agreement of the parties*).

0799-76-R: RCA Victor Employees’ Association (Applicant) v. RCA Limited (Respondent).

Unit: “all employees of the respondent at its Service Branch in Hamilton, Ontario, save and except managers, administrators, and persons above the rank of manager and administrator.” (5 employees in the unit). (*Having regard to the agreement of the parties*).

0803-76-R: Christian Labour Association of Canada (Applicant) v. Ultrastone Products Limited (Respondent).

Unit: “all employees of the respondent at Paris, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff.” (6 employees in the unit). (*Having regard to the agreement of the parties*).

0810-76-R: International Brotherhood of Painters and Allied Trades Local Union 1891 (Applicant) v. McKinlay Drywall Ltd. (Respondent).

Unit: "all painters and painters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regionall Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (not stated employees in the unit). (*clarity note* – see Report of full decision [1976] OLRB Rep. Aug.).

0811-76-R: Service Employees Union Local 204 A.F. of L. – C.I.O. – C.L.C. (Applicant) v. St. Andrews Hospital (Respondent).

Unit: "all employees of the respondent in Midland, regularly employed for not more than twenty-four (24) hours per week save and except professional medical staff, graduate nurses, undergraduate nurses, graduate pharmacists, graduate dieticians, social workers, technical personnel, foreman, persons above the rank of foreman, office staff and persons covered by subsisting collective agreements." (62 employees in the unit). (*Having regard to the agreement of the parties*).

0821-76-R: United Brotherhood of Carpenters and Joiners of America, Local Union 446 (Applicant) v. Howard Avery Construction Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0825-76-R: Ready-Mix Supply Hydro & Construction Drivers, Warehousemen and Helpers Local 230, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Active Excavating & Contracting Limited (Respondent).

Unit: "all truck drivers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the County of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

0830-76-R: Canadian Union of Public Employees (Applicant) v. Cherokee Disposals and Construction Limited (Respondent).

Unit: "all employees of Cherokee Disposals and Construction Limited at Sault Ste. Marie, Ontario, save and except the manager, persons above the rank of manager, persons regularly employed for twenty-four hours per week or less and students employed during the school vacation period." (16 employees in the unit).

0837-76-R: United Steelworkers of America (Applicant) v. A. E. Clement Company (Respondent).

Unit: "all employees of the respondent company in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff." (3 employees in the unit).

0841-76-R: Fuel, Bus, Limousine, Petroleum Drivers and Allied Employees, Local 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Automotive Sunroof Customcraft (ASC) Ltd. (Respondent).

Unit: "all employees of the respondent at Mississauga, Ontario, except supervisors, those above the rank of supervisor, sales and office staff." (14 employees in the unit). (*Having regard to the agreement of the parties*).

0843-76-R: Local Union 785 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Toronto Dominion Bank Forces (Premises Division) (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Counties of Brant and Norfolk, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0844-76-R: United Brotherhood of Carpenters and Joiners of America, Local 38 (Applicant) v. Tantalus Construction Company Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0847-76-R: Ontario Nurses' Association (Applicant) v. St. Andrews Hospital (Respondent) v. Group of Employees (Objectors).

Unit: "all registered and graduate nurses engaged in a nursing capacity employed by St. Andrews Hospital, Midland, save and except administrative supervisors and persons above the rank of administrative supervisor." (no employees in the unit).

0848-76-R: Sudbury Mine, Mill and Smelter Workers Union, Local 598 (Applicant) v. Sudbury Metals Company (Respondent) v. United Steelworkers of America (Intervener).

Unit: "all employees of the respondent company at its plant operation situated in Falconbridge, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and technical staff and engineers." (no employees in the unit).

0849-76-R: Local Union 105 International Brotherhood of Electrical Workers (Applicant) v. A. R. King Company Limited (Respondent).

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the above County of Halton, save and except non-working foremen and persons the rank of non-working foreman." (3 employees in the unit).

0856-76-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. (Applicant) v. Hillerich & Bradsby of Canada Limited (Respondent).

Unit: "all employees of the company at Wallaceburg, save and except foremen and foreladies, persons above the rank of foreman or forelady, office, sales and technical staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (68 employees in the unit).

0859-76-R: International Union of Operating Engineers, Local 793 (Applicant) v. S. McNally & Sons (Respondent).

Unit: "all employees of the respondent in the Regional Municipality of Niagara engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

0861-76-R: Labourers International Union of North America Local 493 (Applicant) v. Acme – Lansdowne (Respondent).

Unit: “all construction labourers in the employ of the respondent within a radius of thirty-five miles from the City of Sudbury Federal Building, save and except non-working foremen and persons above the rank of non-working foreman.” (18 employees in the unit).

0862-76-R: Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada (Applicant) v. Arrow Electric (Respondent).

Unit: “all electricians and electricians’ apprentices in the employ of the respondent in the County of Lambton, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit). (*Having regard to the foregoing*).

0865-76-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Black & McDonald Ltd. (Respondent) v. Local 353 International Brotherhood of Electrical Workers (Intervener).

Unit: “all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (21 employees in the unit). (*clarity note – see Report of full decision [1976] OLRB Rep. Aug.*).

0866-76-R: International Brotherhood of Electrical Workers Local Union 115 (Applicant) v. H/F Electric Ltd. (Respondent).

Unit: “all electricians and electricians’ apprentices in the employ of the respondent in United Counties of Stormont, Dundas and Glengarry, save and except non-working foremen and persons above the rank of non-working foreman.” (21 employees in the unit).

0870-76-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. Advance Carpentry Ltd. (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the District of Rainy River, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in the unit).

0877-76-R: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. J. Felkai Construction Limited (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in the unit).

0889-76-R: Laundry, Dry Cleaning & Dye House Workers’ International Union, Local 351 (Applicant) v. Glove Reconditioners Division of Total Service Inc. (Respondent).

Unit: “all employees of the respondent at its plant in Stoney Creek, Ontario save and except supervisors, persons above the rank of supervisor, office and sales staff, students employed during the school vacation period and persons regularly employed for not more than twenty-four hours per week.” (39 employees in the unit).

0895-76-R: Sheet Metal Workers International Association Local Union #47 (Applicant) v. Culliton Brothers Limited (Respondent).

Unit: "all sheet metal workers and sheet metal workers' apprentices in the employ of the respondent in the United Counties of Stormont, Dundas and Glengarry, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit).

0896-76-R: United Steelworkers of America (Applicant) v. Custom Concrete Limited (Respondent).

Unit: "all employees of the respondent working at and out of Hoyle, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period." (5 employees in the unit). (*Having regard to the agreement of the parties*).

0903-76-R: Canadian Chemical Workers Union (Applicant) v. Drug Trading Company Limited (Respondent).

Unit: "all employees of the respondent at its warehouse at 470 Midwest Road in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, registered pharmacists and persons regularly employed for not more than 24 hours per week." (42 employees in the unit).

0920-76-R: Labourers' International Union of North America Local 1081 (Applicant) v. Wimpey Homes Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Counties of Brant and Norfolk, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0922-76-R: International Union of Operating Engineers, Local 793 (Applicant) v. Savini Construction Co. Ltd. (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

0927-76-R: Labourers' International Union of North America, Local 183 (Applicant) v. Atlantic Contracting Company Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

Applications Certified Subsequent to Pre-Hearing Vote

0660-76-R: Canadian Chemical Workers' Union (Applicant) v. Canadian International Paper Company Container Division (Respondent) v. International Chemical Workers Union and its affiliated Local 898 London, Ontario (Incumbent Trade Union).

Unit: "all office employees of the respondent at 575 Pall Mall Street, London, Ontario save and except supervisors, persons above the rank of supervisor, Plant Accountant, Assistant Plant Accountant, Paymaster, Computer Operator and Financial Statement Co-Ordinator, Secretary to the Production Manager, one Secretary to the District Manager, Sales Staff and Students employed during school vacation periods." (17 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		17
Number of persons who cast ballots		14
Number of ballots marked in favour of applicant	14	
Number of ballots marked in favour of Incumbent Trade Union	0	

0732-76-R: Service Employees International Union, Local 204; affiliated with A.F. of L. – C.I.O., C.L.C. (Applicant) v. Mount Sinai Hospital (Respondent).

Unit: "all office and clerical employees employed at the Hospital in Metropolitan Toronto save and except supervisors, persons above the rank of supervisor, secretaries to the following: Executive Director, Assistant Executive Directors, Directors of Medical Education, Director of Personnel, all other Directors including all Medical Directors, Director of Library Services, Director of Purchasing, Director of Admitting, Director of Communications, Director of Accounting, Director of House-keeping, Director of Nutrition, Director of Engineering, all Assistant Directors including Assistant Director of Communications, Assistant Director of Housekeeping, Assistant Director-Nutrition and Assistant Director of Engineering; all Department Managers including Manager - Department of Radiological Sciences; Budget Accountant; the Payroll Supervisor and all secretaries employed for physicians, for the Hospital Auxiliary, for the Mount Sinai Institute; geographic secretaries; all assistant supervisors in Central Service; office managers, buyers, medical photographers, systems analysts, ledger-keepers, accountants, patient representatives, professional medical staff, persons employed in the personnel department in a confidential capacity relating to labour relations, persons regularly employed for not more than twenty-four hours per week, students employed during the university or school vacation periods, students employed in a co-operative training programme, students employed as medical dicta trainees and all persons covered by subsisting collective agreements or certifications." (220 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		220
Number of persons who case ballots		153
Ballots segregated and not counted	1	
Number of spoiled ballots	2	
Number of ballots marked in favour of applicant	113	
Number of ballots marked against applicant	37	

0756-76-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the City of Brockville (Respondent).

Unit: "all office, clerical and technical employees of the respondent at Brockville Ontario, in the County of Leeds, save and except the Chief Administrative Officer, City Clerk, City Engineer, Department Heads, Payroll Clerk, Assistant Social Services Administrator, Deputy Treasurer, Design Engineer, Secretary to the Superintendent of Operations, Secretary to the Recreational Programme Supervisor, Secretary to the Commissioner of Planning and Development, Secretary to the City Clerk, Secretary to the Chief Administrative Officer, Administrative Assistant, Superintendent of Pollution Control, Foreman of Pollution Control, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons covered by a subsisting collective agreement between The Corporation of the City of Brockville and Local 115, Cana-

dian Union of Public Employees.” (90 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		23
Number of persons who cast ballots	15	
Number of ballots marked in favour of applicant	8	
Number of ballots marked against applicant	7	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

0335-75-R: Canadian Independent Automotive Union (Applicant) v. Chrysler Canada Limited (Respondent). (20 employees).

1142-75-R: International Beverage Dispensers' and Bartenders' Union, Local 280, of the Hotel and Restaurant Employees' and Bartenders' International Union A.F.L.-C.I.O.-C.L.C. (Applicant) v. Seaway Hotels (Ontario) Limited (Respondent). (107 employees).

1458-75-R: Lake Ontario District Council of the United Brotherhood of Carpenters and Joiners of America, on behalf of Locals 397, 572, 1071, 1450 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Huffman Construction Limited, H.C. Five Investments, Citi Centre Peterborough Limited (Respondents) . (no employees).

0609-76-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1190 (Applicant) v. P.N. Carpenters Ltd. (Respondent). (9 employees).

0774-76-R: Beclawat Ontario Limited Employees Association (Applicant) v. Beclawat (Ontario) Limited (Respondent). (33 employees).

0777-76-R: Labourers' International Union of North America, Local 493 (Applicant) v. Major Construction Company (Respondent). (7 employees).

0835-76-R: Canadian Union of Operating Engineers (Applicant) v. King Edward Hotel (Respondent) v. International Union of Operating Engineers Local 796 (Intervener). (4 employees).

Certification Dismissed Subsequent to Pre-Hearing vote

0489-76-R: Graphic Arts International Union, Local 224, Ottawa (Applicant) v. Rolark Cheque Service – Division of Rolph-Clark-Stone, Ltd. (Respondent) v. Rolark Cheque Service Employees Association (Incumbent Trade Union).

Voting Constituency: “All employees of the respondent at Carleton Place, save and except office staff, department heads, foremen and foreladies, persons above the rank of department heads, foreman and

forelady, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (70 employees).

Number of names of persons on revised voters' list		64
Number of persons who cast ballots	55	
Number of ballots marked in favour of applicant	13	
Number of ballots marked in favour of Incumbent Trade Union	42	

0597-76-R: Teamsters, Chauffeurs, Warehousemen and Helpers, Local 91 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Kott Lumber Company (A Division of Reed Lumber Company Ltd.) (Respondent).

Voting Constituency: "All employees of the respondent at and out of Napean Township, save and foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed for the school vacation period." (24 employees).

Number of names of persons on list as originally prepared by employer		22
Number of persons who cast ballots	22	
Number of ballots marked in favour of applicant	7	
Number of ballots marked against applicant	15	

0637-76-R: International Union of Operating Engineers Local 796 (Applicant) v. Kellogg Salada Canada Ltd. (Respondent) v. Canadian Union of Operating Engineers (Intervener).

Voting Constituency: "All 3rd and 4th class Stationary Engineers hired and employed by the Company at the above designated Location." (4 employees).

Number of names of persons on revised voters' list		3
Number of persons who cast ballots	2	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	1	
Number of ballots marked in favour of intervener	0	

0648-76-R: Teamsters Union, Local 141 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Hobbs Hardware Co. (1968) Limited (Respondent).

Voting Constituency: "All employees of the respondent working in and out of its warehouse and shop in London, Ontario, save and except assistant warehouse manager and persons above the rank of assistant warehouse manager, office and sales staff, students employed during the school vacation period, students employed on a cooperative training basis with an institution of higher learning and persons regularly employed for not more than 24 hours per week." (27 employees).

Number of names of persons on list as originally prepared by employer		26
Number of persons who cast ballots	26	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	6	
Number of ballots marked against applicant	19	

0650-76-R: Canadian Steelworkers' Union (Applicant) v. Atlas Steels, A Division of Rio Algom Limited (Respondent) v. United Steelworkers of America and its Local 7777 (Interven8r).

Voting Constituency: "All office, clerical and technical employees of the Company at its plant and offices located at Centre Street in the City of Welland, save and except supervisors and foremen, persons above the rank of supervisor, foreman, salesmen, buyers, plant nurses, mill metallurgists, service metallurgists, research metallurgists, financial analysts, budget analysts, graduate chemists, technical advisors, "know-how" co-ordinators and advisors, job classification analysts, methods engineers, design engineers, construction engineers, employees of the industrial relations department, twelve confidential secretaries reporting to positions such as President, Vice-Presidents, Manager of Engineering and Maintenance, Manager of Metallurgy, Manager of Production Planning, Manager of Industrial Engineering, Manager of Purchasing, General Superintendent, Manager of Product Planning and Development Manager of Systems and Data Processing employees engaged in a graduate training program, casual part-time employees, persons employed for not more than twenty-four (24) hours per week and students on a cooperative training basis with a university, or hired during the school vacation period who are not performing work in the bargaining unit." (181 employees).

Number of names of persons on list as originally prepared by employer		178
Number of persons who cast ballots		168
Number of ballots marked in favour of applicant	47	
Number of ballots marked in favour of intervener	121	

0735-76-R: United Electrical, Radio and Machine Workers of America (UE) (Applicant) v. Weil-McLain (Canada) Limited (Respondent).

Voting Constituency: "All employees of the Respondent in Peel County save and except foremen and persons above the rank of foreman, office and sales staff." (38 employees).

Number of names of persons on revised voters' list		37
Number of persons who cast ballots		36
Number of ballots marked in favour of applicant	16	
Number of ballots marked against applicant	20	

Certification Dismissed Subsequent to Post-Hearing Vote

0498-75-R: United Steelworkers of America (Applicant) v. Hodgson's Steel & Ironworks Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all office, clerical and technical employees of the respondent at Niagara Falls, Ontario, save and except supervisors, persons above the rank of supervisor, accountant, secretary to the president, students employed during the school vacation period, persons regularly employed for not more than twenty-four hours a week and persons covered by a subsisting agreement between the respondent and the United Steelworkers of America, Local Union 6460." (25 employees in the unit).

Number of names of persons on revised voters' list		17
Number of persons who cast ballots		16
Number of ballots marked in favour of applicant	0	
Number of ballots marked against applicant	16	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

0717-76-R: Ottawa Newspaper Printing and Graphic Communications, Local 62 (Applicant) v. Ottawa Citizen and Journal Publishing Company of Ottawa, Limited (Respondent).. (45 employees).

0761-76-R: International Union of Operating Engineers Local 793 (Applicant) v. Miller Paving Ltd. (Respondent). (11 employees).

0800-76-R: Labourers' International Union of North America, Local 183 (Applicant) v. Falco Property Management (Respondent). (2 employees).

0814-76-R: Canadian Union of Public Employees (Applicant) v. Dufferin – Peel Roman Catholic Separate School Board (Respondent). (29 employees).

0832-76-R: United Steelworkers of America (Applicant) v. "Southern Deming" Division of Crane Canada Limited (Respondent) v. Local 219, National Council of Canadian Labour (Intervener). (28 employees).

0836-76-R: Brewery, Soft Drink, Distillery, Distributors and Miscellaneous Workers, Local 1000 Affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Green Giant of Canada Limited (Respondent). (260 employees).

0850-76-R: Labourers' International Union of North America, Local 183 (Applicant) v. Lornal Construction Limited (Respondent). (4 employees).

0876-76-R: Local Union 105 International Brotherhood of Electrical Workers (Applicant) v. A. R. King Company Limited (Respondent). (10 employees).

0891-76-R: Labourers' International Union of North America, Local 183 (Applicant) v. Simcoe Point Investment (Respondent). (2 employees).

0892-76-R: Labourers' International Union of North America, Local 183 (Applicant) v. Lornal Construction Limited (Respondent). (4 employees).

0907-76-R: Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers, Local 230 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Ontario Paving Company a Division of/or Operated by Giuseppe, Alfano and Sons Ltd. (Respondent). (10 employees).

0910-76-R: International Union of Operating Engineers, Local 793 (Applicant) v. B. G. Checo Engineering (Ontario) Ltd. (Respondent). (4 employees).

APPLICATIONS FOR DELCARATION TERMINATING BARGAINING RIGHTS

0324-76-R: Wilson-Munroe Company, Employees, (Division of Fine Paper Ltd.) (Applicant) v. Canadian Paperworkers Union, Local 1291 (Respondent) v. Wilson-Munroe Company (Intervener). (Granted).

Unit: "all employees of Wilson-Munroe Company at its warehouse, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (24 employees in the unit).

Number of names of persons on list as originally prepared by employer		24
Number of persons who cast ballots	23	
Number of ballots marked in favour of respondent	4	
Number of ballots marked against respondent	19	

0411-76-R: Ambrose O'Reilly (Applicant) v. Warehousemen and Miscellaneous Drivers Union, Local 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Respondent). (*Granted*).

Unit: "all employees of Drug Trading Company Limited in its warehouse located at Scarborough, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, registered pharmacists, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (42 employees in the unit).

Number of names of persons on revised voters' list		41
Number of persons who cast ballots	28	
Number of spoiled ballots	1	
Number of ballots marked in favour of respondent	1	
Number of ballots marked against respondent	26	

0436-76-R: Mary Clemente, et. at. (Applicants) v. CUPE, Local 101 (Respondent). (*Granted*).

Unit: "all office and clerical employees of the College at London, Ontario, save and except the warden, the bursar and the librarian, and persons above the rank of the warden, the bursar and the librarian, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (10 employees in the unit).

Number of names of persons on revised voters' list		9
Number of persons who cast ballots	8	
Number of ballots marked in favour of respondent	0	
Number of ballots marked against respondent	8	

0469-76-R: Kirk McDougall (Applicant) v. Teamsters Local Union No. 879 (Respondent). (*Granted*).

Unit: "all employees of Tugham Express Limited working at or out of Kitchener, Ontario and Mississauga, Ontario save and except dispatchers and foremen, persons above the rank of dispatcher and foreman, office and sales staff." (8 employees in the unit).

Number of names of persons on list as originally prepared by employer		8
Number of persons who cast ballots	8	
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	8	
Number of ballots marked against Respondent	8	

0517-76-R: Edward R. Kantowicz (Applicant) v. Carleton University Academic Staff Association (Respondent) v. Carleton University (Intervener). (500 employees). (*Terminated*).

0576-76-R: Paul Emile Lafrance (Applicant) v. International Woodworkers of America (Respondent) v. Genwood Industries Ltd. (Intervener). (25 employees). (*Dismissed*).

0864-76-R: Jim Baxendale (Applicant) v. Teamsters' Local Union No. 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers (Respondent) v. Armbrö Materials & Construction Ltd. (Intervener). (64 employees). (*Withdrawn*).

APPLICATIONS FOR DECLARATION OF SUCCESSOR STATUS

0786-76-R: Local Union – 636 – International Brotherhood of Electrical Workers, AFL-CIO-CLC (Applicant) v. The Public Utilities Commission of the Town of Trenton (Respondent). (*Granted*).

0787-76-R: Local Union – 636 – International Brotherhood of Electrical Workers, AFL-CIO-CLC (Applicant) v. The Public Utilities Commission of the Town of Trenton (Respondent). (*Granted*).

0886-76-R: Local Union 636 International Brotherhood of Electrical Workers – A.F.L.-C.I.O.-C.L.C. (Applicant) v. The Public Utilities Commission of the City of Kitchener (Respondent). (*Granted*).

0887-76-R: Local Union 636 International Brotherhood of Electrical Workers – A.F.L.-C.I.O.-C.L.C. (Applicant) v. Waterloo Public Utilities Commission (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

0839-76-U: Aisby Metal Works Limited (Applicant) v. George Meservier, and United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 628 (Respondents).

- and -

0853-76-U: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 628 (Applicant) v. International Association of Bridge, Structural and Ornamental Iron Workers Local 759 and Larry Ballie (Respondents). (*Direction*).

0855-76-U: The Citizen, A Division of Southam Press Limited (Applicant) v. The Ottawa Newspaper Guild, Local 205, of the Newspaper Guild and James McCarthy (Respondents). (*Direction*).

APPLICATION FOR DECLARATION THAT LOCK-OUT UNLAWFUL

0768-76-U: United Cement, Lime & Gypsum Workers International Union (Applicant) v. Custom Aggregates and Custom Concrete Limited (Respondents). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO PROSECUTE

0443-76-U: Ontario Secondary School Teachers' Federation District 1 (Applicant) v. The Windsor Board of Education and W. Pilotis, W. Mickle, R. Dureno, R. G. Field, B. Ducharme, R. Simpson, A. Newman, F. Clark; G. Hawkins, A. McCrindle, F. Alexander, D. Cook. B. Newman, Jr., A. Caird, L. Schiller, G. Barichello, and N. Libby (Respondents). (*Withdrawn*).

0445-76-U: Ontario Secondary School Teachers Federation District 1 (Applicant) v. The Windsor Board of Education and W. Pilotis, W. Mickle, R. Dureno, R. G. Field, B. Ducharme, R. Simpson, A. Newman, F. Clark, G. Hawkins, A. McCrindle, F. Alexander, D. Cook, B. Newman, Jr., A. Caird, L. Schiller, G. Barichello, and N. Libby (Respondents). (*Withdrawn*).

0446-76-U: Ontario Secondary School Teachers; Federation District 1 (Applicant) v. The Windsor Board of Education and W. Pilotis, W. Mickle, R. Dureno, R. G. Field, B. Ducharme, R. Simpson, A. Newman, F. Clark, G. Hawkins, A. McCrindle, F. Alexander, D. Cook, B. Newman, Jr., A. Caird, L. Schiller, G. Barichello, and N. Libby (Respondents). (*Withdrawn*).

0447-76-U: Ontario Secondary School Teachers' Federation District 1 (Applicant) v. The Windsor Board of Education and W. Pilotis, W. Mickle, R. Dureno, R. G. Field, B. Ducharme, R. Simpson, A. Newman, F. Clark, G. Hawkins, A. McCrindle, F. Alexander, D. Cook, B. Newman, Jr., A. Caird, L. Schiller, G. Barichello, and N. Libby (Respondents). (*Withdrawn*).

0523-76-U: Imperial Tobacco Products (Ontario) Limited (Applicant) v. Persons Referred to in Schedule "A" to the Application (Respondent). (*Withdrawn*).

0524-76-U: Imperial Tobacco Products (Ontario) Limited (Applicant) v. Persons Referred to in Schedules "A", "B" And "C" of the Applications (Respondent). (*Withdrawn*).

0530-76-U: Ontario Secondary School Teachers' Federation, District 1 (Applicant) v. The Education Relations Commission (Respondent). (*Dismissed*).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

1285-75-U: Roger Desbois (Complainant) v. Ernie's Signs Limited (Respondent). (*Granted*).

0004-76-U: Upholsterers International Union of North America, AFL/CIO (Complainant) v. Craft-line Industries Ltd. (Respondent). (*Withdrawn*).

0129-76-U: Toronto Typographical Union No. 91 (Complainant) v. C C H Canadian Limited (Respondent). (*Affirmative*).

0173-76-U: Upholsterers International Union of North America, AFL/CIO (Complainant) v. Craft-line Industries Ltd. (Respondent). (*Withdrawn*).

0267-76-U: Fred E. Baliskiy (Complainant) v. Toronto Typographical Union, No. 91 (Respondent). (*Dismissed*).

0312-76-U: Canadian Textile & Chemical Union (Complainant) v. McGregor Hosiery Mills Limited (Respondent). (*Dismissed*).

0345-76-U: Upholsterers International Union of North America AFL/CIO (Complainant) v. Craft-line Industries Ltd. (Respondent). (*Withdrawn*).

0374-76-U: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) Local 636 (Complainant) v. Holland Hitch of Canada Limited (Respondent). (*Withdrawn*).

0485-76-U: Canadian Workers Union (Complainant) v. Canron Ltd., Eastern Structural Division (Respondent). (*Granted*).

0511-76-U: Jack P. Fogal (Complainant) v. Toronto Typographical Union, Local 91 (Respondent). (*Dismissed*).

0586-76-U: Ontario Nurses' Association (Complainant) v. Etobicoke Health Department (Respondent). (*Withdrawn*).

0590-76-U: Ontario Nurses' Association (Complainant) v. Lady Minto Hospital (Respondent). (*Withdrawn*).

0593-76-U: Ontario Nurses' Association (Complainant) v. Oxford County Health Unit (Respondent). (*Withdrawn*).

0594-76-U: Ontario Nurses' Association (Complainant) v. Oxford County Health Unit (Respondent). (*Dismissed*).

0604-76-U: Patrick Hann (Complainant) v. Service Employees Union, Local 204 A.F.L.-C.I.O.-C.L.C. (Respondent) v. Baycrest Centre of Geriatric Care (Intervener). (*Dismissed*).

0631-76-U: Canadian Textile & Chemical Union (Complainant) v. McGregor Hosiery Mills Limited (Respondent). (*Dismissed*).

0642-76-U: Local #1502 of the Canadian Union of Public Employees (Complainant) v. The Hydro-Electric Commission of the City of Sudbury (Respondent). (*Terminated*).

0670-76-U: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Complainant) v. The Corporation of the County of Middlesex (Respondent). (*Dismissed*).

0672-76-U: Edward Zeppa (Complainant) v. Local 304 Canadian Union of United Brewery, Cereal, Soft Drink and Distillery Workers./Dorans Breweries Ltd., Sault Ste. Marie, Ont. (Respondent). (*Withdrawn*).

0705-76-U: Canadian Union of Public Employees on behalf of its Local 14 (Complainant) v. The Public Utilities Commission of the Town of Forest (Respondent). (*Withdrawn*).

0709-76-U: Ann Percic (Complainant) v. Christian Labour Association of Canada (Respondent) v. Bestview Holdings Limited (Intervener). (*Withdrawn*).

0736-76-U: Retail, Wholesale and Department Store Union, Local 579, of the Retail, Wholesale and Department Store Union – A.F.L.-C.I.O.-C.L.C. (Complainant) v. M. Loeb Limited (Respondent). (*Withdrawn*).

0750-76-U: Graduate Assistants Association (Complainant) v. York University (Respondent). (*Withdrawn*).

0753-76-U: James T. White (Complainant) v. Municipal Tank Lines and Canadian Tank Lines Union (Respondents). (*Withdrawn*).

0760-76-U: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Complainant) v. Charles Wilson Limited (Respondent). (*Withdrawn*).

0765-76-U: International Woodworkers of America (Complainant) v. Allatt Limited (Respondent). (*Withdrawn*).

0767-76-U: United Cement, Line & Gypsum Workers International Union (Complainant) v. Custom Aggregates and Custom Concrete Limited (Respondents). (*Withdrawn*).

0784-76-U: Canadian Union of Public Employees and its Local 1664 (Complainant) v. The Corporation of the Town of Smiths Falls (Respondent). (*Withdrawn*).

0797-76-U: Teresa Roposo & Maria Feijo (Complainants) v. Select Food Products Limited (Respondent). (*Withdrawn*).

0817-76-U: Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Michael Bros. Excavating A Division of/or operated by Royal Excavating and Grading Limited (Respondent). (*Withdrawn*).

0824-76-U: Robert Leroy Housser (Complainant) v. Hamilton Street Railway Co. AFL-CLC Division 107, Hamilton, Ontario and Canada Couch Lines, Niagara Falls, Ontario (Respondent). (*Withdrawn*).

0834-76-U: Pattern Makers League of North America (Toronto Association) (Complainant) v. Ontario Pattern Works (Respondent). (*Withdrawn*).

0938-76-U: Canadian Union of Public Employees and its Local #1776 (Complainant) v. City of Brampton Public Library Board (Respondent). (*Withdrawn*).

APPLICATION UNDER SECTION 39

0578-76-M: Mrs. Helena Wybenga (Applicant) v. The Canadian Union of Public Employees and its local Number 1956 (Respondent Trade Union) v. The University of Ottawa (Respondent Employer). (*Granted*).

APPLICATION FOR DETERMINATION UNDER SECTION 95(2)

1551-75-M: Labourers' International Union of North America, Local 527 (Applicant) v. Campeau Corporation (Respondent). (*Granted*).

APPLICATIONS UNDER SECTION 112A

0418-76-M: Labourers' International Union of North America, Local 183 (Applicant) v. First Federal Management (Respondent). (*Withdrawn*).

0419-76-M: Labourers' International Union of North America, Local 183 (Applicant) v. First Federal Construction Ltd. (Respondent). (*Withdrawn*).

0770-76-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada Local Union 666 (Applicant) v. E. S. Fox Limited (Respondent). (*Withdrawn*).

0771-76-M: Labourers' International Union of North America Local 506 (Applicant) v. The General Contractors' Section of the Toronto Construction Association, (Accredited) and Faehrmann Construction Limited (Respondents). (*Withdrawn*).

0805-76-M: Labourers' International Union of North America, Ontario Provincial District Council, on behalf of Local Union 247 (Applicant) v. Bradsil Limited (Respondent). (*Withdrawn*).

0813-76-M: International Union of Operating Engineers, Local 793, for Gordon Baxter (Applicant) v. Baxter Crane Service Ltd. (Respondent). (*Terminated*).

0820-76-M: A Council of Trade Unions, acting as the representatives and agent of Teamsters Local Union 230 and Labourers' International Union of North America, Local Union 183 (Applicant) v. The Metropolitan Toronto Road Builders' Association (Respondent). (*Withdrawn*).

0831-76-M: A Council of Trade Unions acting as the representative and agent of Teamsters' Local Union 230 and Labourers' International Union of North America, Local 183 (Applicant) v. Toronto Asphalt and Concrete Constructors Association and Repac Construction and Materials Limited (Respondents). (*Withdrawn*).

0854-76-M: A Council of Trade Unions, Acting as the Representative and Agent of Teamsters Local Union 230 and Labourers' International Union of North America, Local Union 183 (Applicant) v. The Metropolitan Toronto Road Builders' Association, and Dufferin Construction Company (Respondent). (*Withdrawn*).

0924-76-M: Labourers' International Union of North America, Local 183 (Applicant) v. Heavy Construction Association of Toronto (Respondent) (*Withdrawn*).

APPLICATION FOR RECONSIDERATION OF BOARD'S DECISION

0211-76-R: International Molders & Allied Workers Union (Applicant) v. Aeroquip (Canada) Limited (Respondent) v. Group of Employees (Objectors). (*Request Denied*).



Labour
Relations Board

Ontario

Decisions October 76

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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1976] OLRB REP.

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.

ARTHUR MacKENZIE BRUNSKILL

The Ontario Labour Relations Board and all persons who dealt with it suffered a grievous loss in the death of Arthur MacKenzie Brunskill on October 26, 1976.

Even in these solemn circumstances, it seems almost inappropriate to use his full name because, during even the most important of his official functions as Registrar, he acted as, and was respected as "Art" Brunskill. That fact alone says much for his relationship with those with whom he dealt on a business basis.

Art Brunskill was Registrar of the Ontario Labour Relations Board from 1955 until his death. He had been with the Board since 1945, serving as Chief Clerk and Examiner before becoming Registrar.

We are indeed hard put to find words more apt than those uttered by Rev. William F. Phipps, who conducted the funeral service, to describe Art Brunskill's work as Registrar.

"As the Registrar of the Labour Relations Board of Ontario, he was constantly in the middle of conflicting parties; but somehow he maintained the deepest respect from both management and labour. As one person said, 'he had the beautiful capacity to smooth ruffled feathers, but he rarely ruffled any himself'.

Although carrying a heavy load, he never appeared wearied or burdened; but rather, always took the time to help people—by making their load easier; by placing a few telephone calls; by a few well-chosen words; or by listening to their plight and then quietly, but effectively, acting. He made other people's jobs easier.

Art Brunskill was a public servant most of his working life. And to many people he was a model administrator. Anyone who dealt with him would confirm that he ran a smooth and efficient operation, but in a pleasant and civilized manner."

We would simply add that Art conducted the internal administration of his office with a benign firmness and a courteous efficiency that elicited the highest respect for himself and the office he so greatly enhanced.

Those who knew Art more intimately will sorely miss his ready wit, his generosity as a host, and the sincerity and warmth of a delightful and gentle companion and friend.

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Strike – S82 – Whether the strike prohibition in the Act should be qualified by considerations of the purpose of a work stoppage – Whether a work stoppage to protest Federal Legislation a “strike” – Whether Provincial Legislation valid in extending to cover work stoppages that are political in nature – *British North America Act*,

– Appropriate Remedy – Effect of importance and complexity of the issue.

BEFORE: Donald D. Carter, Chairman, and Board Members H.J.F. Ade and E. Boyer.

APPEARANCES: *F.G. Hamilton, J.A. Baker and G. Shamanski for the applicant; Martin Levinson and Paul Cavalluzzo for the respondent.*

DECISION OF DONALD D. CARTER, CHAIRMAN, AND BOARD MEMBER H. J. F. ADE: October 13, 1976

1. This is an application brought under section 82 of the *Labour Relations Act*, seeking directions from the Board for the purpose of preventing anticipated work stoppages at three of the applicant’s plants in Ontario on October 14th, the “National Day of Protest” sanctioned by the Canadian Labour Congress.

2. The application raises an important labour relations question and, potentially, a fundamental issue of constitutional law. The labour relations questions concerns the exact scope of the strike prohibition found in the *Labour Relations Act*, and whether that prohibition must be implicitly qualified by taking into account the purpose underlying any work stoppage. The emergence of the constitutional law issues depends upon the answer given to this first question. If the strike prohibition is interpreted as being of wide application, and not qualified by underlying purpose, then there is the fundamental question of whether such a wide prohibition is beyond the competence of the provincial legislature, because it interferes with both freedom of expression and political action by a trade union and its members. To put the question more succinctly, does the Province of Ontario have the legislative authority to prohibit work stoppages that are political in nature?

3. The facts upon which this application are based are relatively straightforward. The applicant is in the business of manufacturing glass containers. Three of its Canadian plants are in Ontario, located at Wallaceburg, Hamilton, and Bramalea. All three of these plants operate on a continuous basis, 24 hours a day, seven days a week. In order to operate continuously, there are three shifts and four work crews to work those shifts. At the Wallaceburg plant, approximately 800 hourly-rated employees are represented by the United Glass and Ceramic Workers of North America (the union) and its local 235, and approximately fifty clerical, office employees are represented by the union and its local 246. At the Hamilton plant, approximately 650 hourly-rated employees are represented by the union and its local 203, while approximately fifty salaried, office employees are represented by the union and its local 258. At Bramalea, only the hourly-rated production employees, approximately 500, are represented by the union and its local 260. All of the employees represented by the union and its locals are covered by existing collective agreements, one for each sepa-

rate bargaining unit. The agreement in respect of the Hamilton office workers, however, has not yet been approved by the Anti-Inflation Board and, as a result, the full monetary increases have not been implemented. All of these collective agreements contain an identical no-strike and no-lockout provision, which states:

“In view of the orderly procedure for settling grievances the Company agrees that there will be no lockout of its employees and the Local and the Union agree that there will be no strike or other collective action which will stop, curtail or interfere with work or the Company’s operations. The Local and the Union agree that if any such collective action takes place, they will repudiate it forthwith and require their members to return to work.”

4. The pattern of events during the last two months assumed much the same shape at all these plants. A meeting between management and the officers of the locals, or local, occurred around the end of the third week of August at each of the three plants, apparently prompted by management’s concern over what might happen on October 14th. The local union officials attending these matters, however, gave no clear indication as to whether there would be a work stoppage on that day. Then, on September 10th, the applicant’s personnel director sent a letter to officers of the international union, including the respondents Perna and Ferguson, setting out its position toward the day of protest. The text of the letter stated:

“It is our understanding that the United Glass and Ceramic Workers’ Union has adopted a National Policy to support the C.L.C. edict to participate in an illegal work stoppage on October 14th, 1976.

In view of the fact that our Company has ten (10) valid collective labour agreements with the United Glass and Ceramic Workers of North America and its locals, you can imagine the losses and damage our Company could experience should the United Glass and Ceramic Workers and its locals and its members participate in the October 14th general strike.

This correspondence is to advise that our Company intends to conduct business as usual on October 14th. Any withdrawal of services would be a violation of the collective labour agreement and contrary to the Ontario, Quebec, Alberta and B.C. Labour Relation Act.

Any violation of the collective labour agreement, with respect to an illegal work stoppage on October 14th, will result in the Company taking legal action to seek full re-dress for all losses, damages, and expenses arising out of such illegal work stoppage.

We expect you and your representatives and local officials will take positive steps to ensure that no such action takes place.”

5. Toward the end of September, a further meeting between union officials and management occurred at each of the three plants. These meetings are of particular significance to this case, because it was at these meetings that the union and its locals clearly indicated their intentions in respect of the national day of protest. The meeting at the Wallace-

burg plant occurred on September 20th. Attending that meeting for the union were Ronald Howes and Garry Watson, the president and vice-president, respectively, of local 235, and Nick Dubois, the president of local 246. Howes, at that meeting, indicated that the locals would be participating in the day of protest, but also indicated that some employees would be available to provide essential services. Dubois, as well, indicated that employees from his local would perform emergency work, if desired. When asked whether the union executive would be working that day, Howes indicated that they would be absenting themselves from work to participate in the day of protest. In response to a further query, concerning the timing of the shutdown, Howes stated that "If I were plant manager, I would expect people to leave at 8:00 a.m. on the 14th and return at 8:00 a.m. on the 15th".

6. The crucial meeting at the Hamilton plant occurred on September 24th. Attending the meeting for the union were officers of both local 203 and 258, and the respondent Ferguson, president of the union's district 6. At that meeting, Anthony Valeri, president of local 203, stated, "We as a whole will not be working on that day [the 14th]." At one point in the meeting, the respondent Ferguson indicated that the union officers would be strongly urging the employees to follow the C.L.C. resolution concerning the day of protest. Valeri, when asked about the timing of the shutdown, indicated that it would be the same as for a statutory holiday. Ferguson, however, countered this statement by stating that Valeri was in no position to make this statement, adding that, if the company co-operated, there would be an orderly shutdown.

7. At the Bramalea plant, the significant meeting took place on September 21st. Attending that meeting for the union were Dave Clarke and Allen Coats, officers of local 260. Clarke, at that meeting, indicated that the international union supported the walkout, and that local 260 would be out. Coats confirmed this intention, stating that it was necessary to support the day of protest if the labour movement in Canada was to get anywhere.

8. The conduct of the union officials at these three meetings indicates to us that the respondent union and its locals had called or authorized a work stoppage for October 14th, and that the officers of the respondent union and its locals had, at the very least, supported or encouraged this work stoppage. This conclusion, moreover, is supported by conduct that occurred after these meetings. On September 23rd, in Wallaceburg, a mass meeting was held for employees in the Wallaceburg area to discuss the day of protest. The presiding officer at that meeting was Ronald Howes, president of local 235. Howes referred to October 14th as a day that all workers should remain off work, and made other statements indicating support for the work stoppage. Also attending the meeting was the respondent James Perna, who also spoke in support of the work stoppage. Once the intentions of the union became clear, the applicant's response was that it would conduct business as usual on the 14th. This intention was conveyed in a letter, dated October 4th, from W.H. Shotton, vice-president – manufacturing, to all employees. Although there was some evidence of informal arrangements for the maintenance of essential services by bargaining unit employees, these arrangements, in our opinion, do not indicate that the applicant did not intend to conduct business as usual. Rather, they indicate only that the applicant was attempting to hedge against the probability that the worst would occur, and its employees would not show up on October 14th. Accordingly, there is no evidence that the anticipated work stoppage was condoned in any manner by the applicant.

9. The evidence further reveals, however, that the threatened work stoppages at the three plants are not the product of a normal collective bargaining dispute. Although affecting the employer in a very direct manner, these work stoppages had not been called for the purpose of obtaining employment concessions from the applicant but, rather, for the purpose of protesting a federal statute, the *Anti-Inflation Act*. It is this unique feature that gives rise to the difficult labour relations and constitutional problems in this application.

10. The prohibition against strikes (and lock-outs) is found in section 63 of the Act. It reads:

63. – (1) Where a collective agreement is in operation, no employee bound by the agreement shall strike and no employer bound by the agreement shall lock out such an employee.

(2) Where no collective agreement is in operation, no employee shall strike and no employer shall lock out an employee until the Minister has appointed a conciliation officer or a mediator under this Act, and

(a) seven days have elapsed after the day the Minister has released or is deemed pursuant to subsection 3 of section 102 to have released to the parties the report of a conciliation board or mediator; or

(b) fourteen days have elapsed after the day the Minister has released or is deemed pursuant to subsection 3 of section 102 to have released to the parties a notice that he does not consider it advisable to appoint a conciliation board.

(3) No employee shall threaten an unlawful strike and no employer shall threaten an unlawful lock-out of an employee.

(4) A strike vote or a vote to ratify a proposed collective agreement taken by a trade union shall be by ballots cast in such a manner that a person expressing his choice cannot be identified with the choice expressed.

(5) Any vote mentioned in subsection 4 shall be conducted in such a manner that those entitled to vote have ample opportunity to cast their ballots.

This statutory provision is two-pronged – it prohibits strikes during the term of a collective agreement and, where there is no collective agreement, it prohibits any strike until the statutory conciliation procedure has been followed. The effect of this provision is to make the strike available for only a limited period – a period when the parties are in the final stages of bargaining for a first collective agreement or the renewal of a collective agreement. All other strikes are untimely strikes and discouraged by section 63, and those provisions ancillary to it. Sections 65, 67 and 69 are all intended to discourage the occurrence of untimely strike action.

11. The existence of a prohibition against untimely strikes, however, does not answer the question raised in this case. In order for the prohibition to apply, the work stoppage must be considered to be a strike, and not just an unauthorized absence from work. Strike is

defined in section 1(1) (n) of the Act as including, “a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output”. This definition differs substantially from those adopted by some Canadian jurisdictions. British Columbia, Nova Scotia, Manitoba, and Alberta, for example, appear to adopt a more narrow definition of strike, qualifying it by reference to a purpose of compelling the employer or another employer to agree to terms or conditions of employment. Ontario, however, is by no means alone in adopting a wider definition, the federal jurisdiction and New Brunswick having almost the same definition as Ontario.

12. The definition of strike as found in the *Labour Relations Act* appears broad enough to encompass the kind of work stoppage that is the subject matter of this application. On its face, the statutory definition appears to require only that the work stoppage, or other disruption of work, result from the combined or concerted action of employees. The two essential conditions for conduct to be characterized as a strike, therefore, appear to be 1) concerted employee activity; 2) some disruption of the employer’s operation. The question is whether we should read into this definition a further condition that the conduct be carried out for the purpose of obtaining concessions from the employer, or some other employer.

13. Counsel for the respondents argued that such an implied qualification of the definition of strike flowed logically from the scheme of the *Labour Relations Act*. The Act, according to this argument, is one designed to regulate collective bargaining between employers and trade unions representing employees and, therefore, conduct to amount to a strike must relate to differences between employers and employees. From this proposition, it was argued, that conduct relating to differences between employees and government, although amounting to a work stoppage, could not constitute a strike within the meaning of the *Labour Relations Act*.

14. Underlying this argument is the assumption that conduct relating to differences between employees and government is unrelated to employer-employee relations. We do not regard this assumption as correct. One only has to apply this assumption to the facts of this application to see the fallacy. The work stoppage, if carried out, would affect the employer-employee relationship since it is evident that the provisions in the collective agreement prohibiting work stoppages would be breached. Section 42 of the *Labour Relations Act*, however, expressly states that collective agreements shall be binding upon employers, trade unions, and employees. If the respondents’ argument were adopted, the result would be that a fundamental obligation contained in a valid collective agreement made under the *Labour Relations Act* would not be protected by the labour board remedial power, so long as it could be established that a work stoppage was not being used for collective bargaining purposes.

15. The definition of strike, moreover, in the absence of the implied qualifications suggested by counsel for the respondents, still appears consistent with the overall scheme of the *Labour Relations Act*. The Act treats the work stoppage as being, in essence, an economic weapon, and restricts its use to a certain collective bargaining situation – the final stages of the negotiation or renewal of a collective agreement. To avoid disruptions in production and to promote industrial relations harmony, all work stoppages occurring outside this lim-

ited period, whatever their underlying motive, are prohibited. The wider definition of strike, therefore, is just as consistent with the overall scheme of the *Labour Relations Act* as the more narrow definition suggested by the respondents. It is a definition, moreover, that is far more consistent with the plain meaning of the Act and the previous interpretations given to the Act by this Board.

16. The scope of the strike definition was considered by the Board in *Wheelabrator Corporation of Canada Ltd.* [1974] OLRB Rep. July 490. In that case, it was established that members of a certain union had established a picket line at a work project in order to obtain work on that project which was being performed by members of another union. The members of that other union refused to cross the picket line, set up by the rival union, and the applicant employer then sought a direction from the Board to restrain the picketing. In granting the direction, the Board characterized the refusal to cross the picket line as amounting to a strike, even though the refusal could not be motivated by any desire of the employees to obtain concessions from that employer, or any other employer, and possibly worked to their own disadvantage. This case illustrates that only two conditions are essential for a strike – concerted employee activity and disruption of the employer's operation. A review of other decisions of the Board, furthermore, reveals that in no case has the Board actually restricted the application of the definition of strike by reference to a qualifying purpose.

17. To restrict the definition of strike in this manner, moreover, would create substantial uncertainty in its application. What purposes would be considered collective bargaining purposes and what purposes would not? In this case, for example, an argument can be made that, even though the purpose of the work stoppage is to protest the *Anti-Inflation Act*, this purpose still relates to collective bargaining since the *Anti-Inflation Act* affects the collective bargaining process. The identification of the true purpose of a work stoppage, and the characterization of that purpose, would not only be a difficult task, but it would also add an extra element of uncertainty that could only be disruptive of employer-employee relations.

18. Our conclusion is that the definition of strike found in the *Labour Relations Act* is wide enough to encompass the conduct in question. The overriding purpose of the Act is to regulate all aspects of the relationship between the employer and the employees represented by the union of their choice. Freedom to organize employees for collective bargaining purposes is protected by the law, and is no longer a matter of self-help. There now exist strict prohibitions against employer interference with organizing activity, supported in some cases by the procedural device of a reverse onus of proof. The self-help remedy of strike action, in turn, has been severely restricted, to be used only as a method of ultimately resolving collective bargaining disputes. All other strikes, including politically motivated strikes, have been prohibited in order to keep to a minimum conduct disruptive to production and harmful to general labour relations harmony. The strike, in our view, was intended by the legislature to be only a collective bargaining sanction, to be applied in a particular labour relations situation, and to be used in no other context, whether political or otherwise.

19. Our interpretation of the strike definition as including politically motivated strikes raises the question of whether the prohibition of this type of strike by the *Labour Relations Act* is beyond the legislative power of the Province. If so, then we would be forced to give the definition of strike a more narrow interpretation on the assumption that the Legislature intended to act only within its own competence. Counsel for the respondents, in an

excellent argument, cited *McKay v. The Queen* (1966), 53 D.L.R. (2d) 532 (S.C.C.); *Re Alberta Legislation*, [1938] 2 D.L.R. 81 (S.C.C.); *Switzman v. Elbing* (1957) 7 D.L.R. (2d) 337 (S.C.C.); and *Smith & Rhuland Ltd. v. The Queen*, [1953] 3 D.L.R. 690 (S.C.C.) as authority for the proposition that we should not give to the *Labour Relations Act* an interpretation that would interfere with rights as basic as freedom of speech and freedom of association. The day of protest set for October 14th, according to this argument, constituted a form of political expression and association, and could not be curtailed by provincial legislation.

20. There is no doubt in our mind that judicial interpretation has restricted the power of the provinces to interfere with basic political freedoms. As Duff, C.J.C. stated in *Re Alberta Legislation*, at p. 108:

“... Any attempt to abrogate this right of public debate or to suppress the traditional forms of the exercise of the right (in public meeting and through the press) would, in our opinion, be incompetent to the Legislatures of the Provinces, or to the Legislature of any one of the Provinces, as repugnant to the provisions of the *B.N.A. Act*, by which the Parliament of Canada is established as the legislative organ of the people of Canada under the Crown, and Dominion legislation enacted pursuant to the legislative authority given by those provisions. The subject matter of such legislation could not be described as a provincial matter purely; as in substance exclusively a matter of property and civil rights within the Province, or a matter private or local within the Province ...”

On the other hand, not every restriction of freedom of expression and association can be regarded as an interference with a basic political freedom. The point was clearly recognized by Chief Justice Duff, who went on to say, at p. 108:

“... Some degree of regulation of newspapers everybody would concede to the Provinces. Indeed, there is a very wide field in which the Provinces undoubtedly are invested with legislative authority over newspapers; but the limit, in our opinion, is reached when the legislation effects such a curtailment of the exercise of the right of public discussion as substantially to interfere with the working of the parliamentary institutions of Canada as contemplated by the provisions of the *B.N.A. Act* and the statutes of the Dominion of Canada. Such a limitation is necessary, in our opinion, “in order,” to adapt the words quoted above from the judgment in *Bank of Toronto v. Lambe*, “to afford scope” for the working of such parliamentary institutions. In this region of constitutional practise, it is not permitted to a Provincial Legislature to do indirectly what cannot be done directly (*Great West Saddlery Co. v. The King*, 58 D.L.R. at p. 6.”

21. One need only look to the *Labour Relations Act* itself to see the soundness of such an approach. Section 56 of the Act restricts certain forms of employer expression – coercion, intimidation, threats, promises or undue influence – that might interfere with the ability of employees to organize. Even though freedom of expression is restricted, no one would suggest that this prohibition is beyond the authority of the provincial Legislature, since not only is there a good industrial relations justification for such a restriction but it is also difficult to characterize this kind of expression as a basic political right. Freedom of

association, moreover, is curtailed by the statutory recognition of union security clauses found in section 38. Contractual union security clauses are now allowed to prevail over an individual's desire not to join or support a trade union, except in the limited situation where that desire is based upon a sincere religious conviction or belief. There is, of course, a good industrial relations justification for permitting this restriction upon the freedom of the individual to join or not to join an association and, conversely, the freedom being asserted is not regarded as being a basic political right.

22. The same kind of analysis must be applied to the prohibition in this case. Although we have already found a valid industrial relations justification for this prohibition, the analysis must now be carried further. The remaining question, and it is fundamental, is whether the right to strike amounts to a basic political right that should be protected from provincial encroachment. We think not. The strike in Canada, unlike the situation in some European countries, has seldom been used as a form of political expression. It can hardly be regarded, therefore, as a "traditional form" of the exercise of the right of public debate, and its curtailment can hardly be regarded as substantially interfering with "the working of the parliamentary institutions of Canada". The history of the strike in Canada has been one of its use as an economic weapon in the collective bargaining process. Its transformation into a form of political expression has very recent origins, as we are all aware. This sudden transformation, in our opinion, cannot result in overnight legitimacy as a basic political right. What we have, therefore, is a collective bargaining sanction being used for a political purpose, and not the exercise of a basic political right.

23. This conclusion does not mean that there is no political aspect to the conduct in question. Undoubtedly, the work stoppage does have a political motivation. What we are saying is that the labour relations justification for the wider interpretation of the strike prohibition outweighs the political justification for a more narrow interpretation. This is not the first time that there has been a tension existing between labour relations considerations and the protection of basic political rights. The same kind of problem was faced in *Oil, Chemical and Atomic Workers International Union v. Imperial Oil Ltd.* (1964 D.L.R. (2d) 1 (S.C.C.)), *Koss v. Kunn* (1962), 30 D.L.R. (2d) 242 (S.C.C.), and *Smith & Rhuland Ltd. v. The Queen*. In the first two cases, the labour relations justification prevailed, while in the last case basic political rights were regarded as being of greater importance. In all three cases, however, a balancing operation was conducted. It is this kind of balancing operation that we have conducted in this case and, having completed this operation, we have found that the wider interpretation of the strike prohibition does not take this prohibition outside the province's constitutional jurisdiction over labour relations.

24. We have concluded that the definition of a strike found in the *Labour Relations Act* is sufficiently wide to cover a strike that has an underlying political purpose. It follows, therefore, that the apprehended work stoppage in this case amounts to a strike. We have already found that the employees in question are covered by collective agreements. The agreement covering the Hamilton office workers, however, is subject to the approval of the Anti-Inflation Board and there may be some question as to whether it constitutes a final and binding collective agreement. Even if this agreement is not final and binding, and we make no determination one way or the other on this question, the union, not having resorted to conciliation, would not be in a position to strike on October 14th. We conclude, therefore, that the respondent trade union, and its local, have called or authorized an unlawful strike, and the officers of the respondent trade union and its locals have supported or encouraged an unlawful strike.

25. The final question concerns the manner in which we should exercise our remedial power under section 82. Counsel for the respondents argued that, given the applicant's delay in bringing the application, the Board should refuse to grant any relief in the matter. It was the respondents' contention that the applicant could have brought the matter on more quickly and, especially in view of the importance and complexity of the issue, it ought to have proceeded more expeditiously. We do not consider that the applicant delayed unreasonably in bringing this application. The evidence indicates that the applicant only became fully aware of the respondents' intentions by the end of the third week of September, and that the application was filed with the Board on October 1st. The delay in the filing of the application does not appear unreasonable in view of the time needed to prepare such an application.

26. We do not consider, however, that the importance and complexity of the issue should be taken into account when determining the appropriate form of relief in this case. The case presented us with not only a difficult labour relations problem, but also a fundamental constitutional issue. We have dealt with both issues and have arrived at a conclusion that we consider to be well supported by legal authority. An administrative tribunal such as a labour board, however, cannot be, and should not be, the ultimate authority on matters affecting the constitution of Canada, such authority belonging constitutionally to the Superior Courts of Canada. However secure we feel about the correctness of our decision that the work stoppage is an illegal strike, if we were to issue a direction based on our interpretation of the division of responsibilities between the federal government and the provinces, and this interpretation was later overruled by the Courts, then the effect of an order would be to interfere with the exercise of a basic political right, an interference that could not be repaired by any subsequent legal remedy. On the other hand, if we fail to issue a direction, and our interpretation is later upheld by the Courts, the applicant would suffer a short disruption of production that could be repaired by recovery of damages through the grievance arbitration process. These considerations convince us that the balance of convenience in this case dictates some form of relief other than a direction.

27. A declaration, in our opinion, is the form of relief most appropriate to the circumstances of this case. This relief serves as a warning to those persons named in the application that, in the Board's opinion, the work stoppage anticipated to occur on October 14th is illegal. In other words, if the work stoppage does occur, those persons involved in the work stoppage face all the legal consequences that flow from participation in an illegal strike.

28. We, therefore, declare that the work stoppage called by the respondent trade union and its locals, and supported or encouraged by its officers, is an illegal strike under the *Labour Relations Act*.

DECISION OF THE BOARD MEMBER E. BOYER

I respectfully dissent from the award of my colleagues in this matter.

(1) Before setting forth my reasoning on the legal conclusions reached by the majority I wish to comment on certain facts which have not elaborated upon sufficiently by them.

In paragraph 25 of the majority award, the majority finds that the evidence indicates the Respondents only became fully aware of the Respondent's intentions by the end

of the third week of September. They conclude in view of this that the application was brought to this Board expeditiously, namely on October 1, 1976.

I cannot agree with this finding. The Plant Manager of the Applicant's Wallaceburg operations, Mr. Brian Ried, testified that on September 15, 1976, Mr. Dubois, President of the Respondent's Local 246 and another executive board officer of the same Local, Mr. Yazbeck, made it clear that services would be withdrawn on October 14th. The Company informed both that it considered this illegal and would take whatever steps were necessary. Mr. Ried also testified in examination-in-chief and in cross examination that the Company began making contingency production plans immediately after this meeting.

(2) To suggest as does the majority that, in the light of these facts, the Applicants have acted expeditiously is difficult to comprehend. More than two weeks elapsed prior to the filing of this application on October 1, 1976. This placed the Board and the Respondents in an extremely difficult position to deal with the very complex issues raised in this case. I agree with my colleagues when they state that proceedings under section 82 must be less leisurely than the Board's normal procedure. However, the Respondent's solicitors became aware of the application on Tuesday afternoon, October 5th – a day after the Respondents had received it. The hearing was scheduled for Thursday, October 7th, and the Respondent's solicitors requested an adjournment until Tuesday, October 12th. The Board did grant a one day adjournment in this matter, primarily because many of the 25 Respondents in the case had not been in contact with their solicitors. However, I find the Respondents did not have reasonable notice in the circumstances of this case.

(3) In my respectful opinion, the Applicant could and should have brought this matter to the Board earlier. It did not, and the Respondents and the Board were given little time to consider carefully the issues raised in this application. I would mention the uncontradicted statements of the Respondent's solicitors to the effect that the Applicant's solicitors gave them no notice of the proceedings filed before this Board and dated September 30th – even though both firms had been involved in other labour matters for the same parties as recently as September 22nd, 1976. Section 82 does provide for expeditious relief. Expeditious relief requires proper behaviour from the party seeking such relief. I would have found this Applicant did not meet this standard and would have refused to exercise the discretion vested in the Board under Section 82.

(4) Another portion of the evidence has been dealt with very briefly by the majority. It became clear from the evidence and from the undertakings of the Respondents given during the course of the hearings that none of the plants of the Applicant would be picketed during the October 14th protest by its employees. The Applicant informed the Board that picketing might take place at its plant by persons who were not its employees at its Bramalea operation. Board Member Ade requested the Respondents to consider an undertaking that would require them to make their best efforts to prevent such picketing and the Respondents, Mr. Clarke and Mr. Coates, President and Vice-President of the Bramalea Local 260, gave such undertaking.

(5) What is more, all Locals of the Respondent gave the Company assurances and undertakings that they would seek to provide a complement of emergency and start-up crews on October 14th. The task of these crews would be to maintain and operate certain sensitive equipment on October 14th in order to both protect the equipment and to facilitate a start-up on October 15th.

(6) These facts are, in my view, important because they indicate that the parties were not involved in an economic dispute of the type contemplated by the Labour Relations Act. Witnesses for the Respondent, Mr. Ronald Brewer, Personnel Manager of the Applicant at Bramalea, Mr. Grainger, Personnel Manager of the Applicant at Wallaceburg, and Mr. Challimer, Plant Manager of the Applicant at Hamilton all testified the Respondent's officers had informed them the October 14th day of protest was not a strike against the Company. These statements were clearly supported by the objective acts of the Respondents referred to above.

(7) In paragraphs 13 and 14 of their award, the majority refer to the argument of the Respondents that the Act is one designed to regulate collective bargaining between employees and employers and therefore, conduct to amount to a strike must relate to differences between employers and employees. In paragraph 14 the majority states:

"... One only has to apply this assumption to the facts of this application to see the fallacy. The work stoppage, if carried out, would affect the employer-employee relationship since it is evident that the provisions in the collective agreement prohibiting work stoppages would be breached. Section 42 of the *Labour Relations Act*, however, expressly states that collective agreements shall be binding upon employers, trade union, and employees. If the respondents' argument were adopted, the result would be that a fundamental obligation contained in a valid collective agreement made under the *Labour Relations Act* would not be protected by the labour board remedial power, so long as it could be established that a work stoppage was not being used for collective bargaining purposes."

With the greatest respect, this type of reasoning begs the question. I find it anything but obvious that the collective agreement would be breached in these circumstances. The question before an arbitration board would be whether the no strike provision in a collective agreement was breached by a political protest of the type contemplated on October 14th. An arbitrator might take into account the intention of the parties interpreting the no strike clause. Did the parties intend to encompass such an event within its scope when they negotiated the no strike clause?

Section 36 of the Labour Relations Act deems that every agreement shall contain a no-strike clause. While there would be a dispute between the parties, it might well be a dispute about political freedoms. It need not be a strike under the collective agreement any more than it is a strike under the Labour Relations Act.

(8) Counsel for the Respondents argued that the scheme of The Labour Relations Act indicated that the Board must look to the purpose of the work stoppage in order to determine whether it is strike. It has argued that the work stoppage must relate to a collective bargaining dispute in which concessions are sought from an employer. The preamble of the Act provides that it is intended "to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions ...". The provisions of the Act referred to in argument clearly demonstrate that is the relationship between employers and employees that is being regulated. Hence, a strike within the meaning of the Act must relate to a dispute between the employer and his employees.

(9) Section 37 of The Labour Relations Act demonstrates that this is so. This provision provides for the final and binding settlement by arbitration of all differences between employers and employees during the life of a collective agreement. As counsel for the respondents stated in argument, this legislative provision is the consideration given to employees for surrendering their right to strike during the collective agreement. This provision specifies the differences over which employees cannot strike but must arbitrate. Is the dispute in question such a difference? Nobody could reasonably argue that a protest against the anti-inflation programme is a difference within the meaning of section 37. It follows that such a protest is not the kind of dispute which the Labour Relations Act was intended to prohibit during the life of this collective agreement.

(10) Counsel for the respondents also suggested, correctly in my opinion, that the prohibition against lock-outs is the quid pro quo for the prohibition against strikes during the collective agreement. Section 1(1) (i) defines "lock-out" as including:

" 'lock-out' includes the closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his employees, with a view to compel or induce his employees, or to aid another employer to compel or induce his employees, to refrain from exercising any rights or privileges under this Act or to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, an employers' organization, the trade union, or the employees; "

As counsel indicated, a closing of operations by an employer in order to protest against the anti-inflation programme could not be construed as a lock-out within the meaning of the Act. Why then should a stoppage of work in order to protest against this programme be construed as a strike? Are we to assume that the Legislature intended to impose a greater obligation on employees than on employers? I feel that such an assumption is unwarranted by the wording and spirit of The Labour Relations Act. I agree with counsel for the Respondents that the protest on October 14, 1976, is not a strike within the meaning of The Labour Relations Act.

(11) The majority refers to a previous Board decision in *Wheelabrator Corporation of Canada Ltd.* [1974] O.L.R.B. Rep. July 490, in order to illustrate the scope of the definition of strike. That case involved the members of one union honouring the picket line of another union which claimed the work being performed by the members honouring the picket line. The Board in that case found such refusal to work to be a strike. The majority seeks comfort from this case in that it feels that the members who refused to cross the line were not seeking concessions from their employer. I cannot concur with this interpretation. Whether or not the members of the union in the *Wheelabrator* case were acting to their own advantage, the fact remains that they were seeking concessions from their employer. In industrial relations language, these employees engaged in a "sympathy strike". There can be no question that the day of protest called for October 14, 1976, cannot be construed as a sympathy strike as there is nothing the employer can do to advance the goals of his employees. Furthermore, the *Wheelabrator* case demonstrated a real collective bargaining dispute between the picketers and the employer. Surely, this is the kind of conduct labour legislation is intended to regulate and moreover, in the *Wheelabrator* case, the Board referred to a judicial interpretation of the Canada Labour Code in which the honouring of a legal picket line was

not found to be a strike: *Furness Withy and Co. Lt.* (1974 unreported). The Federal Act defines strike in similar terms as The Labour Relations Act.

(12) The majority decision holds that only two conditions are essential for the characterization of a work stoppage or a strike – concerted employee activity and disruption of employer operations. The *Furness Withy* case demonstrates that something more is required. As well, the chairman in the course of his questioning demonstrated that something more is required when he asked whether employees going fishing together constituted a strike. Surely such conduct can't be so construed. If such is the case, the question is what is that something more. I believe that the submission of counsel for the Respondents provides us with the answer. There must be a collective bargaining dispute in which a concession is sought from the employer before any work stoppage can be construed as a strike.

(13) The majority has stated that such an interpretation “would create substantial uncertainty” and be “disruptive of employer-employee relations”. I find this proposition impossible to support for, as the majority pointed out several Canadian provinces have specifically adopted this kind of definition in their legislation. There does not seem to have been any substantial uncertainty or disruption of employer-employee relations in those provinces. And, the Labour Relations Boards of those provinces do not appear to have had any serious problems in determining what are and are not collective bargaining purposes. Note for example the *MacMillan Bloedel Packaging Ltd. and Local 8 and Canadian Paperworkers Union Local 592 and Local 686* [1976] 1 Canadian L.R.B.R. p. 90.

(14) The majority has further stated that “the self-help remedy of strike action, in turn, has been severely restricted, to be used only as a method of ultimately resolving collective bargaining disputes. All other strikes, including politically motivated strikes, have been prohibited in order to keep to a minimum conduct disruptive to production and harmful to general labour relations harmony”. Again, with respect I cannot support the position of the majority. It certainly is true with regard to employer-employee relations, but when the purpose of the work stoppage is clearly not directed at the employer, but rather at the Federal Government, then I would suggest that the majority's argument loses its persuasiveness. It has little to do with labour relations harmony. The facts in this case are crystal clear that the Union has made every effort to ensure that the shut down will be as problem-free as possible and that production will resume again on October 15 as quickly and efficiently as possible. There has been no evidence placed before this Board with regard to the effect on labour relations harmony as a result of the October 14 protest. I am unwilling to reach such a sweeping conclusion without evidence and in the light of recently stated business opposition to the controls programme.

(15) Quite apart from my finding that the definition of “strike” does not encompass political protests, it is my view that any other interpretation would be beyond the constitutional jurisdiction of the Board. It has been argued that a work stoppage relating to a protest against government policy is guaranteed to all employees as Canadian citizens under their rights of freedom of speech and freedom of association: *McKay v. The Queen* (1966), 53 D.L.R. (2d) 532 (S.C.C.); *Re Alberta Legislation*, [1938] 2 D.L.R. 81 (S.C.C.); *Switzman v. Elbing* (1957) 7 D.L.R. (2d) 337 (S.C.C.); and *Smith & Rhuland Ltd. v. The Queen*, [1953] 3 D.L.R. 690 (S.C.C.)

(16) In *Re Alberta Legislation*, at page 146, Mr. Justice Cannon stated:

"Democracy cannot be maintained without its foundation: free public opinion and free discussion throughout the nation of all matters affecting the State within the limits set by the Criminal Code and the common law. Every inhabitant in Alberta is also a citizen of the Dominion. The Province may deal with his property and civil rights of a local and private nature within the Province; but the Province cannot interfere with his status as a Canadian citizen and his fundamental right to express freely his untrammelled opinion about Government policies and discuss matters of public concern. The mandatory and prohibitory provisions of the Press Bill are, in my opinion, ultra vires of the Provincial Legislature. They interfere with the free working of the political organization of the Dominion. They have a tendency to nullify the political rights of the inhabitants of Alberta as citizens of Canada, and cannot be considered as dealing with matters purely private and local in that Province. The Federal Parliament is the sole authority to curtail, if deemed expedient and in the public interest, the freedom of the press and the equal rights in that respect of all citizens throughout the Dominion."

In *Smith and Rhuland Ltd.*, Mr. Justice Rand stated at pages 99 – 100:

"The Canadian social order rests on the enlightened opinion and the reasonable satisfaction of the wants and desires of the people as a whole: but how can that state of things be advanced by the action of a local tribunal otherwise than on the footing of trust and confidence in those with whose interests the tribunal deals? Employees of every rank and description throughout the Dominion furnish the substance of the national life and the security of the state itself resides in their solidarity as loyal subjects. To them, as to all citizens, we must look for the protection and defence of that security within the governmental structure, and in these days on them rests an immediate responsibility for keeping under scrutiny the motives and actions of their leaders. Those are the considerations that have shaped the legislative policy of this country to the present time and they underlie the statute before us."

I am of the view that a Board finding prohibiting the day of protest would interfere with the employee's status as a Canadian citizen and his fundamental right to express freely his untrammelled opinion about Government policies and discuss matters of public concern.

(17) In paragraph 21 the majority refers to provisions of The Labour Relations Act which appear to limit freedom of speech and freedom of association. However, these provisions relate to the right to speak about employment problems and the right to associate in a trade union for bargaining purposes. Neither limitation relates to speaking against or associating for the purpose of protesting against government policy. The fact that the employer may be affected by the exercise of these freedoms does not make exercise of these freedoms illegal. The exercise of civil liberties often has this impact on innocent third parties.

(18) In paragraph 22 of the majority award, they appear to state that the balance of interests weighs in favour of the employer because "political strikes" are not a traditional form of the exercise of public debate. However, if you illegalize such conduct, how can it ever become such a traditional form. Surely, this is not reason enough to prohibit such political expression especially when such a prohibition is within the power of the federal government alone.

(19) The *Imperial Oil Ltd.* case [1963] S.C.R. 584, upon which the majority relies is clearly distinguishable from this case. In that case, the effect of the decision did not "affect the right of any individual to engage in *any* form of political activity which he may desire." (My emphasis). The decision of the majority in this case does prohibit one form of political activity, i.e. the protest against government policy by the stoppage of work. Finally, *Koss v. Kohn* (1962) 30 D.L.R. (2d) 242, is distinguishable on the ground that it involved the kind of activity which was clearly intended to be regulated by The Labour Relations Act. The activity in question was a "recognition strike." It is applicable to the facts before this Board.

(20) I, therefore, would dismiss the application on the grounds that the conduct in question is not a strike within the meaning of The Labor Relations Act and that to prohibit such conduct would be beyond the constitutional powers of the Board.

0253-76-U, 0282-76-U, 0311-76-U Canadian Textile and Chemical Union,
(Complainant), v. McGregor Hosiery Mills, (Respondent).

Evidence – Discharge For Union Activity – Requirement for particulars – Rule 47 – Whether respondent has a duty to request particulars – Effect of evidence being adduced regarding misconduct not covered by particulars

– Whether witness must produce notes used to refresh his memory before hearing

– S79(4a) – Effect of failure to call at hearing a senior company officer who had ordered discharge.

BEFORE: D. H. Kates, Vice-Chairman, and Board Members O. Hodges and J. E. C. Robinson, Q.C.

APPEARANCES: *Michelle Swenarchuk, Madeleine Parent, Laurell Ritchie and Natalie Benevidis for the applicant; W. J. McNaughton and A. Lipson for the respondent.*

DECISION OF D. H. KATES, VICE-CHAIRMAN, AND BOARD MEMBER O. HODGES, October 7, 1976:

2. These are a series of complaints filed under section 79 alleging that the grievors were treated by the respondent contrary to sections 56, 58, 61 and 62 of The Labour Relations Act. At the outset, the parties agreed that the complaints ought to be consolidated and heard together.

3. The principal grievance for which evidence was adduced at the hearings pertained to the discharge of Mrs. Natalie Benevidis on May 7, 1976, allegedly for the support contributed to the complainant as its plant organizer in connection with the latter's effort to acquire bargaining rights on behalf of the respondent's employees. The other grievances with respect to Mr. Cyril Singh and Mr. Syed Saeed Dullah Shah pertain to certain letters of censure threatening dismissal delivered on May 12th and 13th respectively should their attendance record fail to improve. It is alleged that the said reprimands were motivated by the respondent's efforts to frustrate the complainant's campaign having regard to the grievors' contributions on its behalf.

4. At the outset, the Board notes that during the course of the inquiry that consumed three days of hearings, we were required to make innumerable procedural and evidentiary rulings for which commitments were made to record in writing. The Board, in order to place in contextual perspective the issues arising out of the submissions made by counsel, is of the view that some useful purpose will be served by briefly reviewing the background circumstances precipitating the filing of the complaints.

5. The respondent company is a manufacturer of hosiery on Spadina Avenue in Metropolitan Toronto. Approximately 275 employees are engaged in all phases of the respondent's operations. Of these employees, many are of multi-national and ethnic origin. The evidence further indicates that a large number of employees are Portuguese whose proficiency in English is minimal. Indeed, the respondent for a short period of time permitted its lunchroom premises to be used for English lessons after working hours.

6. In late December 1975, several female employees upon opening their pay envelopes discovered that they were denied premium pay for the Boxing Day holiday. Their disposition was further aggravated by the knowledge that more senior male employees were being paid for the holiday. Mr. Singh stated that he attempted to contain their anger and disappointment by offering to act as their spokesman with respect to putting forward their grievances. He also suggested at the time that this problem would not have arisen had they been represented by a trade union. The consensus was that representatives of the complainant ought to be contacted with a view to exploring the feasibility of trade union representation.

7. On January 13, 1976, the first organizational meeting took place. Ms. Laurell Ritchie is engaged by the complainant as its business agent who apparently assumed some responsibility for supervising the campaign. She indicated that she was contacted by Mr. Singh with respect to organizing the respondent's employees. At that time Mr. Singh provided Ms. Ritchie with the name and address of Mrs. Natalie Benevidis whom he recommended because she was bilingual and thereby could help the campaign by persuading Portuguese employees to sign membership cards. Ms. Ritchie approached Mrs. Benevidis at her home at which time she was given the names and addresses of other employees who showed some interest in trade union representation. At the same time the two made arrangements for setting up the first meeting. Approximately fifteen employees were in attendance and were addressed in Portuguese by Mrs. Benevidis. Mr. Singh was also in attendance and apparently was responsible for the presence of two other employees at the meeting. At that time it was resolved to initiate the campaign and the ensuing discussion pertained to organizational strategy in context with the Board's requirements for certification. Ms. Ritchie explained that both Mrs. Benevidis and Mr. Singh were the complainant's principal in-plant organizers. At the hearing scheduled for August 4th, the Board was advised that an application for certification had indeed been filed and a number of the membership cards filed in support of the application were directly attributable to the grievors' efforts. And the evidence as adduced through both the grievors indicates that during lunch period and coffee breaks, these employees either together or apart would approach employees with a view to persuading them to join the complainant trade union. Ms. Ritchie stated that upon Mrs. Benevidis' termination, the campaign stalled generally and was particularly frustrated on the first floor finishing department where the grievor was employed as a packager. At that time approximately 102 employees in the proposed bargaining unit had signed cards.

8. The respondent asserts that Mrs. Benevidis was terminated for cause having regard to her chronic absenteeism and record lateness. Indeed, the other grievors were sent letters of censure for the same reason. Mr. Erwin Dresner, General Manager of the respondent company, held overall responsibility for the operation of the factory although Mr. W. Thornes was specifically responsible for the knitting department. He stated that at the commencement of the new year the respondent became concerned about the complaints that were being received from supervisory staff with respect to the attendance record of some of the employees. The respondent thereupon resolved to tighten up its procedures and isolate the more chronic offenders. In April 1976, Mr. Dresner instructed the respondent's payroll clerk to conduct a survey extracted from information contained on the time cards for the purposes of pinpointing these offenders for reprimand. The outcome of the analysis contained in the survey precipitated the termination of Mrs. Benevidis and the letters of censure directed towards several employees. Mr. Dresner advised that no general announcement of other posting of the respondent's "new" policy was made to the employees with respect to requiring a more stringent adherence to the company's rules. Mr. Dresner also advised that after disciplinary action was taken against the more chronic offenders, the survey was destroyed. The payroll clerk responsible for having prepared the survey was not called to adduce evidence with respect to her participation in the analysis. The Board also notes that the time cards filed by the respondent in evidence were adduced in reply (without objection from complainant's counsel) and thereby Mr. Dresner was not subjected to cross-examination with regard to those time cards.

9. Mr. Dresner explained that Mrs. Benevidis was isolated for harsher treatment because she was not only a chronic offender of the respondent's attendance rules, but also because she violated other company regulations. The Board was advised that the respondent required a medical certificate if an employee was absent from work on two consecutive days. We learned from both Mr. Dresner and Mrs. Mary Soumbas, the grievor's supervisor, that Mrs. Benevidis never conformed to that rule. Mrs. Benevidis, on the other hand, denied that she had at any time been asked to produce a medical certificate for her absence for work. Mrs. Soumbas also complained that Mrs. Benevidis failed to phone in or otherwise advise her in advance of an impending absence. Again, Mrs. Benevidis denied this to be the case. Indeed, during the course of cross-examination of Mrs. Soumbas, it was made apparent that indeed Mrs. Benevidis, on the days shown on her time cards as having not attended, did notify either her forelady or another person of managerial responsibility of the purported reasons.

10. Finally, Mr. Dresner explained that certain "tales" pertaining to the nature of the relationship between Mrs. Benevidis and Mr. Singh were causing disruption in the plant operations. The board was made aware of only one incident that could possibly be material to any such complaint and that incident was not in any way shown to adversely affect the productive capacity of the respondent's factory. Indeed, at the time of her discharge, Mrs. Benevidis was not informed that these "tales" were considered as forming part of the reasons for her discharge. Moreover, counsel for the respondent advised us that his client was not relying upon this incident in support of its particular cause. As a result, no further reference will be made to these "tales" as being relevant to the disposition of the complaint.

11. On the afternoon of May 7, 1976, Mrs. Benevidis was called into Mr. Dresner's office where she was informed of her termination and the alleged reasons therefore. Mr. Dresner stated that Mrs. Benevidis received the news of her discharge with "a shrug of the

shoulders". Mrs. Benevidis related a different account of her own reaction to the discharge. She indicated that upon being called into Mr. Dresner's office he advised that Mr. Mat Lipson, a senior officer of the respondent company, instructed that she be terminated. When informed of the reasons for the termination, Mrs. Benevidis challenged Mr. Dresner to give the real reason. Mr. Dresner maintained she was being fired for her chronic absenteeism. At the end of the interview, she was given her separation slip and two weeks separation pay in lieu of notice of termination in accordance with relevant provisions of *The Employment Standards Act*. Her time card does not show Mrs. Benevidis to have punched out on the date of her termination. Upon leaving the premises, the grievor had completed approximately 18 months service with the respondent company.

12. The next day, Mr. Singh prepared a letter on Mrs. Benevidis' behalf which he intended to deliver to Mr. Dresner. Because of Mr. Dresner's absence, he gave the letter to Mr. Nat Lipson whom he found in the latter's office in the company of Mr. Warren. Mr. Singh identified himself and Mrs. Benevidis as spokesmen for the complainant trade union and as such protested her discharge and strongly urged that she be reinstated. Mr. Lipson appears to have responded to Mr. Singh's advice with rage. He was told that Mrs. Benevidis' job status would not be reconsidered. Mr. Warren expressed his gratitude to Mr. Singh whereupon Mr. Singh departed. On the following Monday, May 10th, Mr. Dresner summoned Mr. Singh to his office where he was reprimanded for his lateness and absenteeism and was advised that a failure to improve would lead to his dismissal. When asked in cross-examination why Mr. Singh was not fired as well, Mr. Dresner explained that exceptions are made particularly with respect to Singh because he was being considered for promotion to a supervisor's job!

13. The complainant trade union alleges that at all material times the executive officers and representatives of the respondent were motivated by attempts to frustrate the complainant's campaign in resorting to the disciplinary actions complained of. During the course of cross-examination of Mr. Dresner at the first day scheduled for hearing, questions were put to him relating to meetings attended by him with members of the respondent's managerial staff. Counsel for the respondent objected quite vigorously to the questions because they pertained to information that was not particularized in the complainants' complaint (Form 32). The Board was of the view that the questions put were relevant in that they pertained to the issue of whether an anti-union motive precipitated the discharge. More particularly, counsel was most insistent that questions pertaining to the attendance at meetings by Mr. N. Lipson and Mr. A. Lipson, senior executive officers on the respondent's managerial staff, not allowed to be put to the witness, Dresner. The Board was equally insistent that "relevance" was the issue with respect to the propriety of counsel's questions put in cross-examination. Accordingly, we ruled that the questions were proper and directed the witness to answer them. The Board also advised counsel that if he was caught by surprise by any of the information extracted in the course of cross-examination that was prejudicial to his client's interest, we would entertain at that time a request for an adjournment. The Board also notes that Mr. A. Lipson was seated beside counsel at all times during the course of this inquiry.

14. Counsel nonetheless persisted in objecting to questions put in cross-examination pertaining to information that allegedly was not particularized in the complaint. The Board thereupon indicated that we would commit to writing our perception of the purpose to be served by the requirement for particulars as set out in section 47 of *The Board's Rules on Practice and Procedure*. Section 47 reads as follows:

“47(1) Where a person intends to allege, at the hearing of an application or complaint, improper or irregular conduct by any person, he shall,

- (a) include in the application or complaint; or
- (b) file a notice of intention that shall contain,

a concise statement of the material facts, actions and omissions upon which he intends to rely as constituting such improper or irregular conduct, including the time when and the place where the actions or omissions complained of occurred and the names of the persons who engaged in or committed them, but not the evidence by which the material facts, actions or omissions are to be proved, and, where he alleges that the improper or irregular conduct constitutes a violation of any provision of the Act, he shall include a reference to the section or sections of the Act containing such provision.

(2) Where, in the opinion of the Board a person has not filed notice of intention promptly upon discovering the alleged improper or irregular conduct, he shall not adduce evidence at the hearing of the application of such facts, except with the consent of the Board and, if the Board deems it advisable to give such consent, it may do so upon such terms and conditions as it considers advisable.

(3) Where a statement in an application or complaint or in any document filed under these Rules in respect of the application or complaint is so indefinite or incomplete as to hamper any person in the preparation of his case, the Board may, upon the request of the person made promptly upon receipt of the application, complaint or document, direct that the information stated be made specific or complete and, if the person so directed fails to comply with the direction, the Board may strike the statement from the application, complaint or document.

(4) No person shall adduce evidence at the hearing of an application or complaint of any material fact that has not been included in the application or complaint or in any document filed under these Rules in respect of the application or complaint, except with the consent of the Board and, if the Board considers it advisable to give such consent, it may do so upon such terms and conditions as it considers advisable. R.R.O. 1970, Reg. 551. s.47”

The Board stated at the hearing on June 10th that there is a duty on a complainant under section 47 of *The Rules on Practice and Procedure* to particularize the time, place and circumstances upon which it intends to rely in order to establish the wrongdoings complained of. The purpose of providing this information is obviously with a view to allowing the respondent to prepare its case in advance of the hearing in answer to the allegations. There is a correlative duty, however, upon the respondent to request particulars in advance of the hearing where, having regard to the circumstances contained in the complaint, it anticipates difficulty in preparing its case. Where at the outset of a hearing counsel makes representations with respect to a want of particularity and no request has been made in advance of the hearing, the Board may direct the parties to meet with a view to settling the

difficulties presented by the alleged failure to comply with the Board's requirements. If upon receipt of the required particulars counsel complains his client is prejudiced by the newly acquired information, the Board may accede to a request for an adjournment or defer such adjournment until counsel's anticipated difficulties have indeed arisen. The board also notes that where during the course of the presentation of the complainant's case evidence is adduced which is not particularized in the complaint, the same process as aforesaid will be repeated. (See *The General Freezer Limited* case, 64 CLLC, para. 16,019 at p.696-7 for more extensive elaboration of the requirements of the rule.)

15. In the situation before the Board at the time of his objections counsel was in the course of adducing evidence through the witness, Dresner, with respect to the respondent's alleged reasons for the discharge of Mrs. Benevidis. The objections pertained to questions, the answers to which most likely would have been prejudicial to the respondent's case. The Board remained of the view that so long as such information was relevant to the disposition of the issues before us, the questions were properly put during the course of cross-examination. In other words, the Board's technical rules with respect to the requirement for particulars cannot be used (nor were they intended for that purpose) to circumscribe a party's right to full and complete cross-examination. In short, for better or for worse, counsel must assume responsibility for the witnesses he calls to adduce testimony in support of his client's particular cause.

16. In order to avoid further interruption and delay in proceeding with the inquiry, the Board was of the view at that time that the complainant be asked to inform counsel of any particulars that the complainant intended to rely upon in the presentation of its case that would not conform with our pronouncement. In this regard, we note that counsel for the respondent made no request for particulars in advance of the first hearing. The parties thereupon agreed that the proceedings ought to be adjourned for the purpose of allowing counsel to file further particulars. Counsel proceeded to advise the Board's Registrar of her intention to submit additional particulars and, in due course, such information was dispatched to respondent's counsel prior to the hearings scheduled for August 4th and 5th, 1976.

17. Mr Dresner denied knowledge of the roles played by Singh and Benevidis on the complainant's behalf until the disclosures made by Singh in his letter of protest following the discharge. Mr. Singh, on the other hand, recounted on three occasions spanning the period between January and March where Dresner is alleged to have interviewed him with respect to the progress of the campaign, the name of the union and the nature of his particular role. On each occasion Mr. Singh denied any knowledge pertaining to the trade union. Mrs. Benevidis indicated that on one occasion, on March 4th, Mr. Dresner asked her whether she had signed up any employees as members. She also disclaimed any knowledge of the trade union. The culminating incident with respect to the employer's interest in the campaign occurred on April 1976 when Dresner advised Mrs. Benevidis that Mr. A. Lipson wished to see her in his office. Mr. Dresner confirmed that in mid-April she was summoned by Mr. Lipson with respect to a letter that he had in his possession. Apparently, on April 28th, Mrs. Benevidis gave Singh a letter "as a joke" containing particular reference to "a very important meeting". Upon Singh's correction of the grammatical shortcomings, Mrs. Benevidis ripped the letter in three pieces and place them in her pocket. The next day when she entered the office of Mr. Lipson, she was presented with the same letter that had been taped together. Mr. Lipson admonished her with respect to the conduct of her personal affairs on the

company's premises and made specific reference to "the very important meeting". Mr. Lipson wanted to know whether "the meeting" had anything to do with the trade union. The document adduced in evidence is shown to have a square bracket allegedly penned by Mr. Lipson around the phrase relating to "the meeting". Mrs. Benevidis, in reply continued to deny any knowledge of the campaign. When asked how the letter fell into Mr. Lipson's possession, she could only surmise that her possessions were searched while she was engaged at her work station.

18. The uncontradicted evidence shows that a document dated April 19, 1976, was sent to each employee engaged at the respondent's factory. The letter is signed by A. Lipson, Vice-President and reads as follows:

"April 19th, 1976

Dear

It has come to our attention *that a person (or persons) representing an organization whose name is not known to us*, has approached and visited the homes of some of our lady employees.

The purpose of this letter is to explain to you the position our Company with respect to that visit whether it has been made already or is about to be made to you. These people who are no less than strangers to you, are perhaps making promises concerning your employment conditions with McGregor that we doubt they can support.

Our Company is based on a forty year history of fair play and equality to all employees. Every person working for McGregor is considered as an individual working within the Company, and that person has every right as an individual (no less than her neighbour working beside her) to speak to the Management of the Company to discuss any difficulty, or any proposal for her improvement. McGregor is concerned with every person that works for the Company and considers everyone as part of the family. You are free to discuss any problem you may have with any member of Management, if you wish to do so.

If you have not already been approached by these strangers, and are about to be, please consider very carefully before you accept their word and the promises that they make to you.

It is in your own personal best interest that you consider this letter and its contents very seriously.

Yours sincerely,

McGREGOR HOSIERY MILLS

A. Lipson Vice President

AL:ER "

(emphasis added)

19. The Board notes that Mr. A. Lipson was not called by counsel to adduce evidence with respect to the events described herein. Mr. Lipson, as heretofore noted, was present at the hearings, seated beside counsel in an advisory capacity. The Board further notes that the particulars dated June 23rd filed by the complainant trade union well in advance of the hearing scheduled for August 4th, read in part as follows:

- “4. On or about April 19, 1976, Mr. A. Lipson Vice-President of the respondent sent a letter to each employee attempting by intimidation to discourage them from membership in the trade union.
- 6. On or about April 30, 1976, Mr. Abbie Lipson questioned Mrs. Benevidis, a grievor, about a private letter and sought by intimidation to obtain information about the trade union.

20. On May 7, 1976, Mrs. Benevidis was discharged; on May 12, Mr. Singh was sent a letter of censure on pain of discharge should his chronic absenteeism and lateness fail to improve. Following these events, Ms. Ritchie testified that leaflets were distributed outside the respondent's premises encouraging the employees to continue their support of the complainant's efforts. They were advised of their rights of protection under The Labour Relations Act with respect to employer violation of the unfair labour practice provisions of the Act. Indeed, on May 10, 1976, the instant complaint alleging wrongful dismissal was filed with this Board. After the commencement of these proceedings, the Board was advised that on July 21 Mr. Singh tendered his resignation from the company's employ.

21. On May 12th the respondent convened a meeting of first line supervisors at which time executive officers advised them of the complainant's campaign and recommended that they remain calm. More particularly, they were advised of what the law permitted with respect to rights of the parties during the course of a union's attempt to organize employees for collective bargaining. When questioned by counsel during the course of Mr. Dresner's cross-examination on why it was necessary to instruct supervisors on the law, the respondent's counsel objected.

22. Counsel submitted that the respondent ought to be found to have satisfied the onus attendant upon it under s.79(4a) with respect to the real reason for the discharge. In this regard counsel stressed that the principal witnesses called by the trade union, namely, Mrs. Benevidis and Mr. Singh were so incredible that their stories ought not to be believed. By contrast and in light of the unworthiness of their testimony, the evidence as adduced through Mr. Dresner and Mrs. Soumbas ought to be preferred. Indeed, counsel was so confident of the fragility of the complainant's case that the company was thereby relieved of the necessity of calling upon the Lipsons to adduce evidence in answer to the allegations. Counsel's position is buttressed by a number of specific submissions that may be briefly elaborated as follows. Firstly, it is submitted that the failure of the witnesses to recall with precision, especially in the case of Mrs. Benevidis, the dates and the reasons for their absenteeism ought to shed some adverse light on their testimony. Secondly, the argument is made that the witnesses are liars not so much by virtue of the lies they told their employer, but with respect to those related to the Board. And, finally, the failure by the witnesses to produce their notes that were made of the incidents recounted at the hearing not only affected the weight of their testimony but its admissibility as well.

23. Because the latter argument is of a technical nature it will be dealt with at the outset. During the course of the cross-examination of Mr. Singh, the witness admitted that upon the instruction of Ms. Ritchie he had taken written notes of any incident that pertained to employer involvement and interference in the campaign. These notes were prepared contemporaneously with the incident. Afterwards he telephoned Ms. Ritchie and dictated his notes that were transcribed by her. After each incident, he destroyed his own personal account of a particular event. He never verified the accuracy of Ms. Ritchie's notes with his own before destruction. Prior to the hearing on August 4th, Mr Singh read over Ms. Ritchie's notes and indicated that they conformed to his personal recollection of what happened. Mrs. Benevidis also testified upon cross-examination that she, too, prepared notes of relevant incidents with respect to the campaign that were referred to by her a week before the hearings. Ms Ritchie and Mrs. Benevidis were in physical possession of these notes at the hearing. Counsel for the respondent requested that these notes be produced for inspection by him for the purpose of cross-examination. On each occasion the complainant trade union refused to comply with counsel's request that they be produced. When questioned by the Board as to why they refused to produce the documents, counsel advised, in the instance of Ms. Ritchie that they contained information that was peculiarly classified trade union information; namely, the names of supporters of the complainant's cause. In the case of Mrs. Benevidis, counsel stated her notes contained references of a personal nature relating to her domestic concerns and would be embarrassing to her if revealed in an open forum. The Board offered to black out any reference made in the notes (in the case of Ms. Ritchie) to information that was classified and therefore protected by the privilege contained under s.100 of the Act. Notwithstanding the Board's invitation, the complainant refused to produce the notes. The Board advised counsel that it would note his request and deal with the issue as prescribed by law.

24. What is the law with respect to the weight that ought to be attached to the evidence adduced through the complainant's witnesses arising out of their failure to produce their notes for inspection by counsel? And incidental to this problem, what effect was the failure of Singh to have compared his recollection of the events with Ms. Ritchie's notes at the time of dictation? The results of the Board's research into the issues described herein by no means indicate a clear-cut answer. The cases are quite clear that notes referred to by a party and relied upon as evidence must be produced and filed (past recollection recorded). There is no question that in this case the complainant has not attempted to make use of the notes with a view to relaying upon statements or events recorded therein. Indeed, had such been the case, then counsel's representations with respect to Ritchie's notes would clearly be hearsay as adduced through the witness Singh. (See *R. v McLean*, [1967], 52 CR App R. 80). Nevertheless, it may be safely concluded that the notes in both instances having regard to the admissions made by both Singh and Benevidis, were resorted to with a view to refreshing their memories (past recollection revived). There is no doubt that had these notes been referred to during the course of the hearing, the witnesses would be duty bound to produce the notes for inspection by opposing counsel as an aid in cross-examination. In such cases, however, the witness must satisfy the trier of fact that the notes were prepared contemporaneously with the event before recourse may be made for the purpose of refreshing his memory. (See *Regina v. Husbands* [1974] C.R.N.S. 188 at P.190 with respect to the judicial authorities cited.)

25. The case authority is somewhat murky with respect to the production of documents which are resorted to by a witness prior to a trial with a view to refreshing his

memory from notes made beforehand. In *Regina v. Kerenko* (1965) 49 D.L.R. (2d) 760 (MAN C.A.) the appellant argued that the trial judge erred in disallowing a defence request for the production of a policeman's notebook for the purpose of cross-examination once the policeman admitted that prior to trial, he had refreshed his memory from his notes. That court ruled that so long as the notes were not referred to "at trial", the witness was not bound to produce them. In a like situation in *Regina v. Bonnycastle, ex parte A.G. of Saskatchewan* (1969) 3 D.L.R. (3d) 288, a policeman was not required to produce a report prepared for his superiors, but nonetheless was referred to for the purpose of refreshing his memory prior to trial. On the other hand in *Regina v. Lewis* (1969) 3 C.C.C. 235 (S.C.B.C.) the court on appeal by stated case ruled that reference by a police constable to his notes prior to trial (although not referred to during the course of the trial) for the purpose of refreshing his memory ought, in the trial judge's discretion, to have been directed to have been produced for the purpose of possible cross-examination by opposing counsel. The reasoning of the court in reaching this conclusion was that little distinction can be made between notes referred to during the course of a trial as opposed to just prior to the trial. Where the purpose of the reference is to refresh the witness' memory, it is an undue restriction on the trial judge's discretion to refuse to direct their production. And finally *Regina v. Montils* [1972] 1. OR 11 (CA) was a case on appeal by the A.G. of CANADA from an order of Morand, J. dismissing the application of the A.G. of CANADA for an order prohibiting the provincial court from proceeding with a preliminary hearing. Apparently, during the course of cross-examination of a police witness he disclosed he referred to his notes before his appearance in court and thereby refreshed his memory by reading his entire notes on the matter. The provincial court judge ordered the notes to be produced. The Court of Appeal held that so long as the use of the notes related to the relevant evidence of the witness and to the issues upon which he was testifying, there was no excess of jurisdiction on the part of the provincial judge in his decision to order the notes produced. (See also Sopinka & Lederman, *The Law of Evidence* 1st. ed. at p.496.)

26. Having reviewed the authorities, the Board is of the view that an accurate reflection of the *The Law of This Province* on the issue is that it is within the discretion of the trier of fact to direct that notes referred to by a witness prior to a hearing for the purpose of refreshing his memory be produced with a view to aiding opposing counsel to conduct his cross-examination. And where the evidence shows that these notes were relied upon immediately prior to trial, then the discretion held by a trier of fact to direct their production ought to be exercised. Failure to produce the said notes apparently is at the peril of the party refusing production with respect to the weight to be attached to the witness' testimony. Indeed, the weight to be attached recedes in worth by the failure to establish the contemporaneity and verification of the events transcribed in the notes. In this regard in *R. v. Skwarchuk* (No. 9) [1943] 1 D.L.R. 354, the Saskatchewan District Court recited that:

"A witness before he may refresh his memory from any writing, must have made the writing himself, or it must have been made by someone in his presence, or, at least, he should have examined it while the facts were fresh in his memory and should then have known that the particulars therein were correct."

27. The Board is of the view that the failure by the complainant to produce the notes prepared by Mrs. Benevidis and Ms. Ritchie at the instance of Mr. Singh must reflect adversely with respect to the weight to be attached to their testimony. Moreover, the weight of

Mr. Singh's testimony is further disparaged because of his failure to verify the accuracy of the notes prepared by Ms. Ritchie contemporaneously with the events referred to herein. In making this finding, the Board is mindful that although it did not direct that these notes be produced, it nevertheless extended counsel every encouragement to cause their production. The complainant's posture throughout was that it was not prepared to make these notes available to respondent's counsel.

28. The Board, in reviewing counsel's other representations with respect to the credibility of the complainant's witnesses, is satisfied that the failure to recall with exactitude the occurrence of events is a human failing common to us all. The Board, in reviewing the record, notes that neither Mrs. Soumbas nor Mr. Dresner exhibited the scientific precision in their testimony as complained of by respondent's counsel with respect to the complainant's witnesses. What the evidence does show is that the memories of the witnesses were most often activated by association with events to which an approximate date could be attached. And in the case of both Mrs. Benevidis and Mr. Singh we are satisfied that when an event was referred to, the date was approximately, if not accurately, pinpointed. For example, Mr. Dresner testified that he recalled summoning Mrs. Benevidis to Mr. A. Lipson's office in mid-April. Mrs. Benevidis testified that it was on April 29th. The letter that formed the subject matter of the interview was undated. Who is the liar? Mrs. Benevidis could not recall with exactitude the days she took off to attend Manpower in her quest for a new job. Yet a registration slip issued by the Department of Manpower confirms she was in attendance at approximately the time specified in her testimony. Indeed, the time cards submitted by the respondent shows her to have absented herself on the three days in question.

Finally counsel has coloured his representations with respect to the credibility of the complainant's witnesses by prefacing his questions with such dramatic flair so as to anticipate the desired result. For example, in asking Mrs. Benevidis whether she lied to her supervisors when the excuse given for taking time off to go to Manpower in quest for another job was a dental appointment. Counsel in effect was "sandbagging" his questions. The important thing from our perspective is that the witness told the Board the truth, that is, "Yes, I lied". Nor would one expect an in-plant organizer to admit the truth to her superiors upon being questioned by them with respect to the nature of her role in an organizational campaign. In other words, the Board is of the opinion that no adverse finding can be made with respect to witnesses whose memories indicate reasonable proximity with respect to the occurrence of events and reasonable candour with respect to occurrences that effect their material well-being.

29. The ultimate disposition of this case, therefore, must turn on whether the respondent company, notwithstanding the shortcomings of the complainant's case adverted to in paragraph 26 herein, has satisfied the onus of establishing that the impugned activities were free of an anti-union motive. In other words, was the discharge of Mrs. Benevidis effected for a reason other than that attributable to her alleged contribution to the complainant's efforts to organize the respondent's plant employees? In describing the requirements of satisfying the Board of the burden of proof attendant upon a respondent employer under S. 79 (4a) of the Act, we indicated the following in *The Barrie Examiner* case, (1975) OLRB Rep. October 745 at p. 749:

"What then is the extent of the burden of proof that has been shifted by statute to the respondent? The Act speaks of the burden of proof 'that

any employer ... did not act contrary to this Act'. In its earlier decisions, this Board has stated that, even if only one of the reasons for a discharge related to union activity, the discharge would nevertheless constitute a violation of the Act. For a review of the jurisprudence, see *Delhi Metal Products Ltd.* [1974] OLRB Rep. March 450. In other words, the appearance of a legitimate reason for a discharge does not exonerate the employer, if it can be established that there also existed an illegitimate reason for the employer's conduct. This approach effectively prevents an anti-union motive from masquerading as just cause. Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts, *first*, that the reasons given for the discharge are the only reasons and, *second*, that these reasons are not tainted by any anti-union motive. *Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred."*

(emphasis added)

30. The Board, having regard to the totality of the evidence, the circumstances surrounding the discharge and the demeanour, the credibility of the witnesses and the appropriate weight attached thereto, finds that the respondent has failed to meet the onus required under the Act with respect to *both elements* referred to in *The Barrie Examiner* case. In the first instance, the Board is not convinced that the respondent, through its executive officers and representatives, has not acted in a manner inconsistent with an attempt to thwart the complainant's organizational campaign. The Board, in reaching this conclusion, relies upon the uncontradicted documentary evidence with respect to the communication dated April 19th, 1976, sent to employees in connection with that campaign. The Board notes particularly that the said letter was signed by "A. Lipson, Vice President". Moreover, the Board finds that the interview conducted by Mr. Lipson with Mrs. Benevidis with respect "to the very important meeting" adverted to in paragraph 17 herein, is consistent with the evidence adduced through the complainant's witnesses that a conscientious search with respect to the identity of the trade union, its supporters, and the progress of the campaign was conducted by the respondent's representatives. In short, notwithstanding the shortcomings of the complainant's witnesses, the Board nonetheless prefers their testimony to that of Mr. Dresner in connection with employer interference in the campaign. Indeed, Mr. Lipson's specific reference to the very serious consequences to employees' own personal interest in that letter is sufficient, in our view, to infer a veiled threat to employees' job security in the event of a successful organizational drive. Moreover, Mr. Lipson's prefacing remarks "to a person or persons representing an organization unknown to us" suggests an underlying curiosity that could only be quelled by a concerted effort to determine the identities, not only of the trade union organization, but the names of the person or persons who supported that trade union. Indeed, we find when such became known to the employer, Mrs. Benevidis' fate was sealed.

31. In resolving to reach this conclusion, the Board wishes to emphasize that whatever shortcomings were apparent with respect to complainant's evidence, it did not excuse counsel from calling Mr. A. Lipson to adduce evidence for the purpose of satisfying the onus requirements of the Act. In the first instance, counsel as heretofore described, went to

great pains to insist on the particularization of the complainant's allegations. The complainant in response thereto adverted to both Mrs. Lipson's letter of April 19th and his interview with Mrs. Benevidis as supplying such particulars. The evidence, both documentary and oral, to our satisfaction, indicated that there was some substance to those particulars. In failing to call Mr. Lipson to answer those specific matters we find sufficient to infer a result adverse to the respondent's cause. (See for example *The York Bag Co. Ltd.* case, OLRB M.R. May 1975, 435 at p. 437.) More particularly, the Board finds that it was incumbent upon the respondent to adduce evidence through Mr. Lipson in order to dispel the cloud raised not only by "the veiled" references in the letter authored by him on April 19th, but also to provide some credible explanation with respect to the purpose of the interview with Mrs. Benevidis prior to her discharge. More particularly, the Board was most curious as to how Mrs. Benevidis' letter came into his possession. In absence of any explanation from Mr. Lipson, we are prepared to accept that Mrs. Benevidis' surmise that a search was made of her belongings is as good an explanation as any. In short, the Board has no reason to disbelieve Mrs. Benevidis' uncontradicted recitation of the contents of the meeting with Mr. Lipson. In doing so, the Board concludes that the failure by Mr. Lipson to take the stand as aforesaid may be attributed solely to the respondent's case. In support of the foregoing, the Board refers particularly to the judicial comments reported in *The Canron Ltd., Eastern Structural* case (1976) OLRB Rep. Jan 997 at p. 1002 and the more recently cited case of *Holmes et al v. Alexson et al* [1975] 7 O.R. (2d) 11 (HC) per Lerner, J. whose headnote reads:

"Where a party or witness fails to give evidence which was within his power to give and by which relevant facts might have been elucidated, the court is justified in drawing the inference that the evidence which might have been given would have been unfavourable to the party to whom the failure is attributed."

32. And in the second instance, the Board has not been satisfied that the reason given for Mrs. Benevidis' discharge, namely, her chronic absenteeism etc. constitutes a credible explanation, having regard to the preponderance of the evidence adduced herein. Not only does the documentary evidence as indicated by her time cards filed herein show that the peculiar treatment extended Mrs. Benevidis was patently discriminatory in relation to her colleagues who were sent letters of censure, but we find that her alleged punctuality, although not exemplary, did not deserve any greater discipline than that extended other employees singled out for reprimand. We do not have to conclude, as counsel urges us to, that the survey of employees' time cards on the instruction of Mr. Dresner was fictitious. Nevertheless, the failure by counsel to call the payroll clerk who allegedly prepared the survey to indicate the nature of the analysis undertaken by her and upon which decisions were made, can only result in placing a cloud on the credibility of the respondent's excuse for the discharge. Indeed, the calling of the payroll clerk to adduce evidence may very well have alleviated the requirement of a more complete production of the time cards of employees who were not singled out for reprimand. (See H9) *The Modern Pattern Works Ltd.* case [1976] OLRB Rep. March 67 at p. 69.) Finally, the Board notes that the haste in which the termination of Mrs. Benevidis was effected and the awarding of two weeks severance pay in lieu of notice is not consistent with an employer who denies his employees a Boxing Day premium. Furthermore, we are satisfied that such precipitous recourse is more consistent with an employer who sought with dispatch to frustrate the attempts of his employees to the rights of collective bargaining.

33. The Board has concluded with respect to the grievances of Singh and Shah that no useful purpose would be served in making any direction. In the case of Singh we find that any ruling with respect to him would be clearly academic in that he has left the respondent's employ apparently on relatively good terms. And in the case of Shah, we have concluded that in absence of any specific evidence pinpointing his contribution to the complainant's campaign, his particular grievance simply raises an arguable question which ought to be treated no differently than the letters extended his co-employees. In this regard, the Board does not view its decision as a curb on the employer's prerogative to "tighten up" its rules and regulations, provided they are applied in an even-handed, non-discriminatory manner.

34. The Board notes the respondent's undertaking to meet with the complainant's representatives with a view to compensation. The Board therefore directs that Mrs. Benevidis be re-instated to her job position held prior to her termination without loss of seniority or other benefits. The Board will remain seized in the event of the failure of the parties to agree on amount in compensation. In addition, the Board orders and directs the respondent, its agents and officers, to cease and desist from taking measures that prejudice the rights of employees to the exercise of their rights to join a trade union of their free choice, and to the exercise of their rights to the benefits of collective bargaining.

DECISION OF BOARD MEMBER J.E.C. ROBINSON, Q.C.:

While I am not in agreement with certain of the conclusions of fact and law contained in the majority award, I am in agreement that based upon all of the evidence, the grievant, Mrs. Benevidis, should be reinstated to her job position held prior to her termination without loss of seniority or other benefits.

I would so find.

0842-76-R: Canadian Union of Bank Employees, (Applicant), v. Canada Trustco Mortgage Company, (Respondent).

Trade Union – Jurisdiction – Status – Effect of Constitution not providing a term of office for its officers – S1(1)(n) – Constitutional Law – Whether the Board will initiate inquiry into its jurisdiction – Whether Board had jurisdiction regarding Trust companies.

BEFORE: M.G. Picher, Vice-Chairman and Board Members H.J.F. Ade and D.B. Archer.

APPEARANCES: *Daniel Ublansky and Kenneth V. Rogers for the applicant; C.G. Riggs, J.T. Lindores and G. Takacs for the respondent.*

DECISION OF THE BOARD: October 6, 1976.

2. This is an application for certification. This being the first such application by the applicant it was advised by the Board that it must be prepared at the hearing scheduled to

satisfy the Board in accordance with its usual practice that the applicant organization is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

3. Only one witness, Mr. Kenneth Rogers, who described himself as the National Secretary-Treasurer of the applicant, testified on its behalf.

4. He stated that at 8:05 p.m. on July 26, 1976, he was present at a meeting held in Simcoe, Ontario for the purpose of forming a trade union. At that meeting a chairman *pro tem.* was elected and a draft constitution was presented, discussed and approved by a vote of those in attendance.

5. That meeting then adjourned and a second meeting was commenced on the same premises at 10:10 p.m. Between the meetings 22 of the persons present signed membership applications for the applicant organization. According to Mr. Rogers, the meeting of 10:10 p.m. proceeded as follows:

- 1) The Chairman, R.W. Stewart, called the meeting to order.
- 2) The Chairman noted that 22 applications for membership had been received.
- 3) All applicants then rose and took the oath of membership, thus being admitted as members of the applicant organization.
- 4) Upon a motion duly seconded a vote was taken ratifying the Constitution, being the document that had been discussed and approved at the meeting at 8:05 p.m.
- 5) The three National Union Officers were then nominated and elected by acclamation. They are R.W. Stewart, President; Kenneth V. Rogers, Treasurer; Beverly Thomas, Vice-President.
- 6) The National Officers took their oath of office.
- 7) The meeting adjourned at 10:45 p.m.

6. There has been no other meeting of the applicant organization since that time.

7. In an inquiry of this kind the Board must concern itself with whether the applicant organization is an entity formed, in the words of section 1(1)(n) of the Act, "... for purposes that include the regulation of relations between employees and employers ...". To do so the Board must be satisfied that the organization is a viable entity capable of discharging that purpose and not merely a "paper union".

8. Counsel for the respondent submitted that the applicant is not a trade union within the meaning of The Labour Relations Act inasmuch as there is nothing before the Board to satisfy it that the officers of the applicant organization have been duly elected pursuant to the organization's Constitution. He asserts that this is so for two reasons. Firstly, that there are no express provisions in the Constitution providing for the election of officers or for their term of office, and secondly, that even assuming the Constitution implies a me-

thod of election of the National Officers by delegates from local unions, that is not what transpired at the meeting of 10:10 p.m. on July 26, 1976.

9. In *J. Harris & Sons Ltd.* [1960] CLLC ¶16,177 this Board stated, "... the Constitution of the applicant is the source and limit of its existence ...". In further considering the viability of the organization to perform the functions described in section 1(1)(n) of the Act the Board had this to say:

"How may a trade union under the legislation perform its functions, achieve its purposes, or exercise its rights, or discharge its obligations unless it has duly authorized persons by and through whom it may act and be bound? Without officers of other duly authorized persons, the applicant, by its Constitution, may only act and be bound through a general convention of members. In this respect its position is somewhat analogous to a corporation which may only act and be bound by and through its officers or agents or its shareholders at a general or special meeting. Without authorized persons to act on its behalf, every act of the applicant would require the sanction of a general convention of members with all the procedural requirement entailed thereby. It is obvious that this would impose such a restriction on its activities that for all practical purposes it would be impossible for it to carry out the purposes of its Constitution".

In that case the Board recognized that the words of section 1(1)(n) must be read within the context of the Act generally and went on to say,

"Further, it seems implicit in section 55 (now section 75) of the Act and the sections thereof which deal with collective bargaining and the rights, responsibilities and duties of trade unions, that a trade union will have responsible persons to act and make decisions on its behalf. In this regard section 55 provided, *inter alia*, that the Board '... may direct any trade union ... to file with the Board ... a copy of its Constitution and By-laws and a statutory declaration of its president or secretary setting forth the names and addresses of its officers'.

In regard to notices, proceedings before the Board, collective bargaining, conciliation and arbitration, the Act clearly presupposes the existence of responsible representatives to act on behalf of the union."

10. The issue in the instant case is whether the applicant organization has officers. On the basis of the evidence before us we find that it does.

11. Section 1 of Article III of the Constitution of the applicant states,

"The officers of this National Union shall be the National President, one (1) Vice-President, and the National Secretary-Treasurer.

These officers shall constitute the National Executive Board".

12. In response to the respondent's submission, counsel for the applicant argued that the officers elected at the meeting of July 26, 1976 were duly elected pursuant to the Constitution. On close examination of the evidence the Board is of the view that that is so.

13. Section 2 of Article II of the Constitution is as follows,

"Charter members shall be those members joining the Canadian Union of Bank Employees at its founding convention".

Article VI deals with conventions and refers variously to the Founding Convention (section 4), special conventions (section 2) and regular annual conventions (section 1).

Section 9 provides, in part,

"Nominations for all members of the National Executive Board may be made at the convention",

and section 10 goes on to state,

"Elections may be by printed ballot with a single ballot bearing the names of the candidates for all offices. Each delegate shall receive a ballot indicating the appropriate number of votes he is entitled to cast.

In the alternative a Roll Call ballot may be held".

Section 4 provides, in part,

"All charter members shall be delegates and shall be entitled to one vote at the Founding Convention".

14. The evidence before the Board establishes that the meeting of 10:10 p.m. was the Founding Convention of the applicant organization, that the Convention admitted some 22 persons into the organization as charter members pursuant to the Constitution and that those members then ratified the Constitution and exercised their rights to nominate and elect, albeit by acclamation, the members of the National Executive Board who are the officers of the applicant organization.

15. It is true, as counsel for the respondent points out, that there appears to be no term of office provided for the officers, apart from what can be implied from the provision for nominations and elections at annual or special conventions in sections 9 and 10 of Article VI. To the extent that those conventions are predicated on the existence of locals whose delegates are the only persons capable of voting, and given that there presently are no such locals, it would appear that the terms of office of the officers who emerged from the Founding Convention are at best indefinite. But that is of no concern to the Board. It is a matter purely internal to the union as to how and when, if ever, those officers will be re-elected or replaced. It would make no more difference to the Board if the constitution were to expressly provide for a term of office of one year, four years or life for its officers. This Board's concern is to be satisfied that the applicant has officers who hold office pursuant to the constitutional document that governs the organization and that the organization is at present, and will in the future be, in a position to discharge its day to day obligations, serve the

interests of its members and function for the purposes described in section 1(1)(n) of the Act. In this instance the members of the applicant have chosen to adopt a constitution that provides for the re-election or removal from office of its officers on an uncertain future contingency. It is not for this Board to second guess that choice.

The respondent did not strenuously argue that the Board must, for reasons of public policy, find implied within the section 1(1)(n) definition a requirement that the constitution of a union be unequivocally democratic and without any potential for autocracy. Even if that argument were forcefully made we are satisfied that the mischief that gives rise to it is adequately safeguarded against by the provisions of The Labour Relations Act. Section 49 provides a democratic process whereby employees may, following their own wishes and quite apart from any constitution, end the right of any union to represent them.

16. The Constitution of the applicant lists among its purposes and objectives the following:

“To implement the exercise of the natural rights of Canadian workers to organize that they may more securely work with dignity ...

To secure improved wages, hours, working conditions and other economic bargaining, through advancement of our standing in the Canadian community and in the Canadian labour movement, and through other lawful methods ...

To strive to improve employer-employee relationships”.

17. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

18. At the hearing neither the applicant nor the respondent took any issue with the constitutional jurisdiction of this Board to issue a certificate in the instant application. The Board itself raised the matter, being specifically concerned with its jurisdiction in view of the nature of the business carried on by the employer and the nature of the proposed bargaining unit, especially given the provisions of section 2(g) and 108(1) of the Canada Labour Code, R.S.C. 1970, c.L-1.

19. This Board does not normally embark on its own initiative on a constitutional inquiry. Its normal policy was stated in *Dry Bulk Forwarders Ltd.* [1974] OLRB Rep. Sept. 628 at 632:

“This tribunal has to start with the broad proposition ‘that prima facie labour relations are matters of property and civil rights within the Provinces and are within the competence of the Legislatures of the Provinces, coming as they do within section 92 of the British North America Act’; (see *Regina v. Ontario Labour Relations Board, ex parte Dunn, supra*, p. 356; *Northern Electric v. LRB (Ont.)*, *Communications Workers of America et al, supra*, p. 14,180). Hence when an application comes before us we must presume that the application is constitutionally sound unless this prima facie presumption is rebutted by a party contending otherwise”.

In that case the constitutional objection to jurisdiction was raised by an intervener and was not apparent on the face of the application. The Board there held that once such an issue is raised, it is the duty of the tribunal to deal with it.

It is trite law that no administrative tribunal should seek to assert its jurisdiction where it cannot lawfully do so. Nor should it do so through wilful blindness merely because the parties before it make no objection to its assertion of jurisdiction. It is the inherent duty of every tribunal whose powers are circumscribed by the statutes that govern it to remain within the jurisdictional bounds described by those statutes.

Although the proceedings of this Board are essentially adversarial, the Board may be alerted to the question of some jurisdictional excess other than by the parties. It will then be no less compelled to give conscientious consideration to that issue.

That is not to say that this Board should make independent inquiries of a constitutional nature in every case that comes before it. The constitutional law of Canada is so fraught with grey areas and murky backwaters that such an approach could bring the business of this Board to a standstill.

In the instant case, because of facts disclosed on the face of the application, and given that this appeared to be an unprecedented application insofar as it relates to a trust company, the Board felt bound to move with some caution respecting its jurisdiction, and at the hearing invited written submissions from the parties with respect to the constitutional question.

20. The parties complied. On the basis of the written submissions filed, while the matter is not without some doubt, and bearing in mind that the Board has not had the benefit of vigorous adversarial argument, we are satisfied that the instant application would appear, *prima facie*, to be within the jurisdiction of the Board, and that we may proceed on the footing of the presumption of constitutionality described in *Dry Bulk Forwarders Ltd.*, *supra*.

While judicial authority in this area is slim, in the light of *Re Bergethaler Waisenamt* [1949] 57 Man. R.66; [1949] 1 D.L.R. 769; [1949] 1 W.W.R. 323 (C.A.) and *La Caisse Populaire Notre Dame Limitee v. Moyen* [1967] 61 D.L.R. (2d) 118 (Sask. Q.B.), cited by the applicant without objection by the respondent, and given the apparent absence of any contrary case law, the Board is satisfied that its jurisdiction is made out within the standard of *Dry Bulk Forwarders Ltd.* Since no constitutional objection is raised by the respondent, we therefore proceed on the basis of the presumption therein described.

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Editors note: The Board appointed an officer to inquire and report on bargaining unit appropriateness.

0552-76-U John Charlton Gable, (Complainant), v. Kingston Vending Limited, (Respondent).

Discharge For Union Activity – Parties – Whether employee may bring complaint or whether complaint must be brought by union – Rule 1(1) – Whether someone with notice a party.

BEFORE: M.G. Picher, Vice-Chairman, and Board Members J.D. Bell and O. Hodges.

APPEARANCES: *Richard Fink and John Gable for the complainant; K.W. Kort and K. Young for the respondent.*

DECISION OF THE BOARD: October 7, 1976

1. This is a complaint under section 79 of the Act whereby the complainant alleges that he was discharged contrary to the provisions of section 58(a). He seeks an order of reinstatement with compensation for wages lost since his dismissal.
2. Counsel for the respondent raised a preliminary objection. He argued that in the circumstances of this case the complainant lacked status to bring an application by way of section 79. He argued that since this employee is part of a bargaining unit for which exclusive bargaining rights are held by the Retail Clerks Union Local 486 pursuant to the Board's certificate dated January 7, 1976, an application of this kind can only be brought by that union. According to the respondent the rights of the individual employee would be restricted to a complaint against the union, by way of section 60, grounding an allegation of a breach of the duty of fair representation in the refusal of the union to represent the employee in the instant complaint. The argument concluded that there must first be a finding of a breach of section 60 for this Board to have jurisdiction to proceed under section 79 and that the union must therefore be made a party to the proceedings.
3. Because the motion touched on fundamental rights of employee and union alike under The Labour Relations Act, the Board adjourned to consider the motion, giving notice of the motion to the Retail Clerks Union Local 486, which did not appear at the hearing. The Board subsequently received a written submission from counsel for the union.
4. At the resumption of the hearing we ruled against the respondent's motion. Firstly, it should be noted that the union has been at all material times a party to the proceedings. Section 1(1) of the Rules of Procedure of the Board contains the following definitions:
 - (b) "party" means an applicant or complainant and each person served with notice of the application or complaint, or a person added as a party by the Board under section 54;
 - (c) "person" includes a partnership, employers' organization, trade union and council of trade unions;

In the instant case the union received notice of the complaint and, while it chose not to appear as an intervener, it was a party to the proceedings; any motion to have the Board add the union as a party pursuant to section 54 of the Rules of Procedure is therefore unnecessary.

5. Secondly, dealing with the merits of the respondent's objection, the Board accepts the view expressed by counsel for the union in its written submission that section 58(a) of the Act gives rights to employees as individuals and that the scope of section 79(1), which authorizes the Board to inquire into *any* complaint, does not limit the remedial powers of the Board by requiring that the complaint originate with a trade union.

6. Moreover, the overall scheme of the Act would indicate that the protection of the rights of employees can be effected otherwise than through a trade union. While the great bulk of the proceedings before the Board may involve trade unions, it is worth remembering that section 92(2) of the Act provides for the appointment of Board Members in equal numbers "representative of employers and employees" and not of employers and trade unions.

7. One of the mischiefs that The Labour Relations Act was meant to correct is the threat to the livelihood of an individual for engaging in union activity. In the present economic order an individual's job may be of greater value to him than many forms of conventional property. Therefore, the unlawful taking of his job may call for legal remedies as ample, effective and available as those legal remedies fashioned to protect his property. In our view, if the legislation had intended to circumscribe the remedial rights of individuals in a manner as narrow as that suggested by the respondent, it would have done so expressly. We are not prepared to do so by deduction or inference.

Editor's Note: The decision continued with the facts of this case and dismissed the complaint.

1102-76-U The Citizen, A Division of Southam Press Limited, (Applicant), v. Ottawa Web Pressmen's Union, #62, and Mr. David Lundy, (Respondents).

Strike – S82 – Whether the Board will interpret a collective agreement to determine whether work stoppage illegal or differ to arbitration – Whether refusal to work full shift a strike considering past history of full shift not being required – S1(1)(m).

BEFORE: Ian C.A. Springate, Vice-Chairman.

APPEARANCES: Colin Morley and S.G. Roberts for the applicant; Alick Ryder for the respondent.

DECISION OF THE BOARD: October 5, 1976

1. This is an application for a direction under section 82 of The Labour Relations Act.

2. The applicant (hereinafter sometimes referred to as "the Citizen") is the publisher of a daily newspaper having a wide circulation in the Ottawa area. The respondent trade union (hereinafter referred to as "the union") represents the employees working in the Citizen's pressroom. The Citizen and the union were two of the signatories to a multi-employer multi-union collective agreement covering employees engaged in the newspaper pub-

lishing industry in the City of Ottawa. This collective agreement expired on August 31, 1976. However, the terms and conditions set out in the collective agreement were, pursuant to section 70(1) of the Act, continued in force until October 2, 1976. The parties to the now-expired collective agreement have attempted to reach a settlement with respect to the terms of a new agreement, but as yet without any success. Recourse has been had to the conciliation process, and on September 16, 1976 the Minister of Labour caused to be issued a notice to the effect that she did not consider it advisable to appoint a conciliation board. Having regard to the combined effect of sections 63 and 102(3) of the Act, the employees covered by the collective agreement were in a legal position to strike, and their employers in a legal position to lock them out, on and after October 3, 1976.

3. The events giving rise to this application had their origin in a dispute between the parties as to the proper quitting time for pressroom employees. As a general rule pressroom employees at the Citizen are scheduled to work from 8.00 a.m. to 4.00 p.m. exclusive of a 35-minute lunch break commencing at 12.30 p.m. However, at least until July 12, 1976 there existed a long standing practice of pressroom employees leaving work once the number of newspapers required for that day had been printed. This frequently meant that pressroom employees would leave some 20 to 30 minutes prior to the end of their regularly scheduled shift. It is clear that the management of the Citizen was aware of this practice and had given at least tacit approval to it.

4. Mr. S.G. Roberts, the Citizen's production manager, testified that at some time near the beginning of 1976 management became concerned at the deterioration of the quality of the newspaper and that after some consideration concluded that at least part of the problem was due to the condition of its presses. He stated that because of this management decided that pressmen should be required to work their full shifts, utilizing any time available after the end of the press run to clean the presses. This decision was made known to Mr. B. McNulty, who at that time was the president of the union and chairman of the pressmen's "chapel" at the Citizen, in the latter part of June. (A chapel is comprised of the members of the union working for a particular employer.) Mr. McNulty, however, strongly opposed the plan and suggested that as an alternative the pressmen would seek by special effort to clean up the presses while still leaving at the end of the press run. Mr. Roberts testified that he agreed to go along with this proposal, but that when there was no apparent improvement in the cleanliness of the presses by the end of the month he notified Mr. McNulty that the pressmen would have to start working the full scheduled shift commencing on July 1st. However, at Mr. McNulty's urging it was agreed that the effective date would be altered so as to allow Mr. McNulty some time to condition the employees to the change. Mr. McNulty testified that at the time he agreed that the presses needed cleaning, but that he understood that once they had been cleaned management would take another look at the situation and perhaps revert back to the old system. On cross-examination Mr. McNulty stated that he specifically remembered Mr. Roberts saying that management would look at the situation again once the presses were clean, but he agreed with counsel for the Citizen that Mr. Roberts never actually stated that management would revert back to the old system. On or about July 1, 1976 management posted a notice to the employees in the pressroom stating that commencing on July 12th employees would be required to work to the end of their scheduled shifts.

5. On July 12th the pressroom employees left work immediately after the end of the press run and prior to the end of the scheduled shift. However, following the raising of the

issue rather forcefully by management at the bargaining table on July 13th, the pressroom employees began to work the full scheduled shift. This situation continued for about 2 months until September 14th. It was established in evidence that on Saturdays management continued to allow employees to leave once the press run was completed, and that on Fridays employees had merely continued the long established practice of working even after the day's press run was completed in order to make ready for Saturday's press run.

6. On or about September 10, 1976 representatives of management held a meeting with the pressroom employees. At that meeting there was some discussion concerning the condition of the presses, with the employees contending that they were now clean and with management conceding only that they were now "cleaner." The employees took the position that the old system of leaving early should be re-instated. Management refused to accept this idea, however, although it did put forward a proposal that only some of the pressroom employees stay behind on a rotational basis to do clean-up work. This proposal was rejected by the employees. In his cross-examination Mr. Roberts agreed that at the time of this meeting the quality of the newspaper was greatly improved over what it had been several months before.

7. On September 14 the respondent Dave Lundy, who had replaced Mr. McNulty as chapel chairman, as well as Mr. Mike Ladurantay, the assistant chapel chairman, met with Mr. Roberts and informed him that as a result of a vote taken among the members of the chapel the employees in the pressroom had decided to refuse to work their full shift if the press run was completed earlier. That afternoon following the completion of the press run the pressroom employees left work without permission at 3.40, some 20 minutes prior to the scheduled end of their shift.

8. On September 15th the Citizen filed a grievance against the union claiming damages as a result of the failure of the pressmen to complete their shifts, and indicating that it would take further action if the practice continued. The employees, however, continued leaving at the end of the press run even if it was prior to the scheduled end of the shift (with the exception of Fridays for the reasons set out above). Only the early departures on Saturdays had the approval of management.

9. An additional development occurred on September 22, 1976. On that day the pressmen received pay cheques from which had been deducted amounts representing the time not worked as a result of their leaving work prior to the scheduled end of the shift. This prompted the pressmen to engage in a "study session" during which they refused to do any work. This refusal to work lasted from approximately 10.00 a.m. until the end of the scheduled lunch break. Although the full press run was completed on that day, it was established in evidence that delays in getting the newspaper out as a result of the work stoppage led to a serious decline in the day's sales. At the hearing held in this matter the union indicated that although as yet it had not actually done so it was intending to file a grievance over the action of management in deducting pay for the periods when employees left work ahead of their scheduled quitting time. It should be noted that it was only after the work stoppage on September 22nd that the Citizen filed this application with the Board.

10. Counsel for the parties were in agreement that the work stoppage associated with the "study session" on September 22, 1976 constituted an unlawful strike. The Board agrees with this assessment. Counsel for the applicant also contended that the action of the press-

men in leaving work prior to the end of their scheduled shift likewise constituted an unlawful strike. In response to this, counsel for the respondents adopted a two-fold position. He submitted firstly that it would not be appropriate for this Board to seek to interpret the collective agreement so as to allow it to make a determination as to the legality of the action of the pressmen in leaving work when they did. Secondly, he contended that in any event the actions of the pressmen in this regard did not constitute an unlawful strike.

11. With regard to the issue of the need to interpret the collective agreement prior to ruling on the propriety of the actions of the employees in leaving work when they did, counsel for the respondents submitted that this was more properly the function of a board of arbitration and that therefore the Board should exercise the discretion granted it under section 82 by declining to make any finding in this regard. The Board, however, does not accept that as a general proposition it should refrain from making a finding with respect to an application under section 82 whenever to do so would first require the interpretation of a collective agreement. This is not to say that in certain circumstances the Board may in fact decline to engage in the analysis of a collective agreement, or that having examined the actions of the parties in so far as they relate to the terms of a particular collective agreement the Board may decline to make any finding as to whether or not an unlawful strike has been engaged in. An example of the latter situation is to be found in the *Canadian Elevator Manufacturers* case [1975] OLRB Rep. Nov. 868. In that case certain employees refused to perform work assigned to them and their employers applied for a direction under both sections 82 and 123. The Board, however, concluded that the employers' action in assigning the work to the particular group of employees was unsupported by even a reasonably arguable interpretation of the collective agreement, and that the employers were relying primarily on the principle that an employee is obliged to "perform first and grieve later." The Board in the circumstances of that case refused to make any finding as to whether or not an unlawful strike had been engaged in.

12. Although the facts in the instant case are clearly distinguishable from those in the *Canadian Elevator Manufacturers* case, nevertheless in the matter of the exercise of its jurisdiction the Board was concerned that the action of the Citizen in requiring its pressroom employees to complete their scheduled shift might have been motivated by a desire to bring pressure on the union at the bargaining table. The Board in particular noted the contention made by counsel for the respondents that the actions of management in this regard constituted "a dirty bargaining tactic." Notice to bargain was served on the employer parties to the collective agreement approximately mid-May, 1976, and as noted above negotiations were taking place during the time when the events in dispute occurred. Having carefully reviewed the evidence, however, the Board is satisfied that the actions of the Citizen were not prompted by a desire to bring bargaining pressure to bear on the union. It is undisputed that the condition of the presses was having an adverse effect on the quality of the newspaper, and that the steps implemented by management served in large measure to correct the problem. Further, the willingness of management to twice postpone the implementation of its plan at Mr. McNulty's request is not consistent with the notion that it was trying to pressure the union, particularly in that the first postponement was made to afford an opportunity to the pressmen to see if they could improve the condition of the presses without having to stay past the end of the press run. Even more enlightening in this regard is the fact that on September 10th, after the condition of the presses had been greatly improved, management indicated a willingness to adopt a rotation system whereby only some of the employees would be required to stay on after the end of the press run. This willingness to relax its

requirement that employees work to the end of the scheduled shift appears to belie any suggestion of improper motive on the part of management.

13. One of the arguments put forward by counsel for the respondents was that the requirement that employees work to the end of their scheduled shift constituted a violation of section 70(1) of the Act, and that being an unlawful requirement it should not be supported by a determination by the Board. Section 70(1) states, in part, as follows:

“Where notice has been given under section 13 or section 45 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

- (a) until the Minister has appointed a conciliation officer or a mediator under this Act and ...
- (ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,

as the case may be.”

Counsel submitted that the right of the pressmen to leave work at the end of the press run was either a term or condition of employment or a right or privilege of the employees. In his view the union gave its consent to the change through Mr. McNulty, but that this consent was effective only until such time as the presses had been cleaned up, and that by September 10th the presses were in fact clean and thus the consent had lapsed. With all due respect to counsel, section 70(1) is not applicable to the facts of this case. The requirement that pressmen work their full shift was made effective July 12, 1976, a date when the collective agreement was still in effect. Further, the evidence does not support a finding that the change was made conditional on the union's approval and subject to discontinuance when that approval was withdrawn. This being the case one of the pre-conditions required to invoke section 70(1), namely that no collective agreement be in operation, did not exist at the time.

14. Turning now to the issue of whether or not the action of the pressmen in not working their full shifts subsequent to September 14, 1976 in fact constituted an unlawful strike. Counsel for the respondents contended quite vigorously that it did not. In his view the collective agreement when considered in light of the past practice of the parties did not require employees to work past the end of the daily press run. An alternative, he submitted that the action of the pressmen did not come within the definition of the term “strike” as set forth in section 1(1)(m) in that it was not designed to restrict or limit output.

15. The collective agreement does not specifically set out the times when employees are to start and finish work. Neither does it indicate that a work day is concluded upon the completion of the daily press run. What the collective agreement does do is set out a range of hours as follows:

"Day shift shall be between 8.00 a.m. and 6.15 p.m. except for Saturdays when the shift shall be between 6.30 a.m. and 5.30 p.m. The night shift shall be between 10.00 p.m. and 7.00 a.m. Working hours on shift to run consecutively."

The collective agreement, under the heading "Scale of Wages and Hours, etc." also sets forth a schedule of wages, indicating that wages will increase over time. The entry for the most recent time period is as follows"

"Effective June 1, 1976 to August 31, 1976

Day Rate : \$301.12 per week of 37½ hours,
5 shifts of 7½ hours.
\$ 8.03 per hours straight time.
\$ 12.05 per hour overtime.

Night Rate : \$306.12 per week of 35 hours,
5 shifts of 7 hours.
\$ 8.75 per hours straight time.
\$ 13.13 per hours overtime."

It is not the intention of the Board to deal with the issue of the regular quitting time of pressroom employees or of the payment of wages for time not worked to any greater extent than is necessary for the purposes of this application. It is sufficient to note that nothing in the collective agreement prohibits management from requiring employees to work a full 37½ hours per week and there is no indication that such a requirement would be unlawful or that it would place employees in personal danger. This being the case, the employees were required to perform the work assigned to them. Despite this the employees in combination or in concert or in accordance with a common understanding refused to do so. In the past the Board has held that the refusal of employees acting in concert to do work properly assigned to them constitutes an unlawful strike – even if the performance of that work might entail working over time. (See: *Mobil Paint Company*, [1974] OLRB Rep. Oct. 650. Also see *Hydro Electric Power Commission of Ontario*, [1967] OLRB Rep. May 249 upheld on review at 70 CLLC Para. 14,031 [C.A.]).

16. This, however, still leaves unanswered the contention that in the circumstances of this case the refusal of employees to work past the end of the daily press run did not constitute a strike in that there was no restriction or limitation of output. Section 1(1)(m) defines a strike in the following terms:

"strike" includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output;

Essentially what counsel for the respondents was contending was that since the number of newspapers required for each day were in fact printed, there was no restriction or limitation of output. In the view of the Board counsel seeks to interpret the phrase "restrict or limit output" much too narrowly. Output can be restricted or limited in more ways than just in

terms of the quantity of the output. For example, the work stoppage on the morning of September 22nd did not result in any decrease in the number of newspapers actually printed that day. However, it did lead to delays in getting the paper into circulation with a concomitant drop in sales. It would be illogical to suggest – and counsel did not suggest – that this action of the employees did not constitute a strike. Output was restricted, not in terms of the quantity of output but rather in terms of the timing of the output. Indeed in an industry such as newspaper publishing where the finished product has a relatively short useful life span and where potential customers can turn to other sources for their information, restricting the timing of the output may have a greater adverse effect on an employer than would a straight reduction in the quantity of output. Likewise it appears to the Board that output may be restricted in terms of its quality. The pressroom employees by leaving at the end of the pressrun were essentially refusing to do assigned work designed to improve and maintain the quality of the finished product. Taken to its extreme this type of activity could lead to a situation where the quality of the finished product had so deteriorated as to cause it to be virtually unmarketable. On this basis the Board finds that the actions of the pressmen in leaving prior to the end of their scheduled shift was in the circumstances of this case designed to restrict or limit output, and as such constituted a strike which was unlawful.

17. Before leaving this point, it should be noted that counsel for the applicant contended that a cessation of work or a refusal to work by employees in concert was a strike within the meaning of section 1(1)(m) irrespective of whether or not it was designed to restrict or limit output. Having regard to the above determination, however, there is no need for the Board to make a finding in this regard.

17. The Board having concluded that the employees engaged in an unlawful strike, there remains the question as to whether or not it was called or authorized by the respondent union and whether or not the respondent David Lundy was “an officer, official or agent of the union who counselled or procured or supported or encouraged an unlawful strike.” Counsel for the respondents contended that there was no evidence to support such a finding with respect to either the union or Mr. Lundy. Indeed, he characterized the evidence as establishing only that Mr. McNulty and Mr. Lundy acted at various times as “messenger boys” between the chapel membership and management. Mr. Lundy at all relevant times was chairman of the union’s Citizen chapel and he held himself out to management as a spokesman for the members of the chapel. At no time did he seek to disassociate either himself or the union from the actions of the employees, even though there was an onus upon him to do so while at the same time actively seeking to bring the unlawful strike to an end. (See: *Domtar Packaging Limited*, [1974] OLRB Rep. Dec. 900.) This being the case the Board finds that Mr. Lundy, being an officer, official or agent of the trade union counselled or procured or supported or encouraged an unlawful strike. The Board further finds (having particular regard to section 88(2) of the Act) that the respondent trade union called or authorized an unlawful strike.

19. The applicant requested that the Board issue a series of cease and desist orders with respect to the unlawful strike. However, due to both the proximity of the hearing to the point in time when a strike would become lawful as well as the rather complex nature of the issues, this decision will be released only after the union is in a legal strike position. This being the case it appears that no useful purpose will be served by the issuance of a cease and desist order. However, the applicant in the circumstances of this case is still entitled to a declaration under section 82. As a result, the Board declares that the respondent trade un-

ion called or authorized an unlawful strike and that the respondent David Lundy being an officer or official or agent of the respondent trade union did counsel, procure, support or encourage an unlawful strike.

1002-76-R, 1003-76-R Ontario Haulers Association Inc., (Applicant), v. **Repac Construction & Materials Limited**, (Respondent), v. A Council of Trade Unions acting as the representative and agent of Teamsters Local Union 230 and Labourers' International Union of North America, Local Union 183, (Intervener),

- and -

Ontario Haulers Association Inc., (Applicant), v. **Sherman Sand & Gravel Limited**, (Respondent).

Fraud – Evidence – Certification – Practice – Effect of party placing fraudulent evidence before the Board – Whether the Board will state a case of contempt – *The Statutory Powers Procedure Act*, S.O. 1971, c. 47, S.13 –

– Whether the Board will impose an application bar on an applicant adducing fraudulent evidence

– Whether the Board will award costs.

BEFORE: Donald D. Carter, Chairman, and Board Members P.J. O'Keeffe and J.E.C. Robinson, Q.C.

APPEARANCES: *J.B. Waterman and A. Natale for the applicant; S.C. Bernardo, Val Raponi and Len Racioppa for the respondent Repac Construction; S.G.J. Lane for the respondent Sherman Sand; R. Koskie and B. Teichmann for the intervener.*

DECISION OF DONALD D. CARTER, CHAIRMAN, AND BOARD MEMBER P.J. O'KEEFFE: October 8, 1976

3. These are two applications for certification. The applicant, not having established its status as a trade union on any previous occasion before the Board, was advised in advance of the hearing that it must be prepared at the hearing to satisfy the Board that it was a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*. At the commencement of the hearing, the two applications were joined for the purpose of hearing the evidence relating to the status of the applicant.

4. For the applicant, Mr. A. Natale, its president, gave evidence relating to the formation and evolution of the applicant organization. During the course of examination-in-chief, the Board's attention was drawn to the fact that Natale was referring to a certain document while giving his testimony. The witness's explanation of this document left the Board with the firm impression that the document consisted of all the minutes of the applicant's meetings, and that these minutes had been written out at the meetings by the witness. Given the relevance of this document to the issue of the applicant's status, the Board ordered that this document be admitted into evidence as an exhibit.

5. At the close of examination-in-chief of Natale, counsel for the intervener trade union requested the Board to permit an examination of this exhibit by Mr. Royston Packard, a forensic examiner. The Board adjourned to consider this request. Immediately after the hearing was reconvened, counsel for the applicant made a statement to the Board. The gist of the statement was that the document purporting to be the minutes of the meeting had been written out by Natale just a few days prior to the hearing, being prepared from minutes made by Natale and another person at the time that the meetings were held. Counsel for the applicant stated that there had been no intention to mislead the Board, apologized to the Board, and sought leave to withdraw the applications.

6. Counsel for the intervener trade union, supported by counsel for the other parties opposing the application, requested the Board to state a case under section 13 of *The Statutory Powers Procedure Act*, S.O. 1971, c. 47, in order for the Divisional Court to consider whether the witness should be punished as if he had been guilty of contempt of court. The Board was further requested to dismiss the applications, setting out its reasons for dismissal, and to exercise its discretion under section 92(2)(1) of *The Labour Relations Act* by imposing a bar to future applications by the applicant for a fixed period. In addition, the Board was requested to award costs on a solicitor-client basis to those parties opposing the application.

7. We have no hesitation in rejecting the first request. The initiation of the process for punishment for contempt of a tribunal is a step that would only be taken by this Board in the most serious of cases. Since the sanctions that might result from this process are potentially very severe, the process should only be initiated where the conduct in question amounts to a clear threat to the authority of the Board. We can foresee very few cases where the well-established authority of the Board would need to be reinforced by the coercive sanctions that flow from the exercise of the contempt power. Certainly, the conduct in these two cases falls well short of any threat to the authority of the Board. We have some doubt about whether there was any intention to mislead and, even if such an intention was present, the conduct could at most be styled as an abuse of process, and not as a contempt of this tribunal.

8. Our refusal to state a case to the Divisional Court does not mean that we condone the conduct in question. The determination of the true facts in any case is not an easy task for the Board, but it is made more difficult where witnesses, either intentionally or unintentionally, provide less than a full account of events within their knowledge. An "economy of truth" is often as misleading as the outright fabrication of evidence. This kind of evidential defect, however, is usually discovered by the Board, and its discovery is bound to affect the Board's assessment of that witness's credibility. In turn, the unfavourable assessment of a witness's credibility will often determine the outcome of the matter before the Board. See *The Barrie Examiner*, [1975] OLRB Rep. Oct. 745. If the applicant had proceeded with these cases and the Board had discovered that it had been misled (as would be likely), it would have been difficult for the Board to make a finding of status on the evidence before it, and the application probably would have been dismissed. In view of this consideration, we do not consider it appropriate merely to allow the applicant to withdraw the applications. The two applications, therefore, are dismissed.

9. Our dismissal of the two applications raises the question of whether we would exercise our discretion by imposing a bar. The Board has never regarded this power as being punitive in nature. See *General Freezer Ltd.* (1963), 63 CLLC ¶16,294. In this case, it is sug-

gested that the bar be used as a measure to control what might be regarded as an abuse of process occurring during the hearing. To impose the bar at this point in the proceedings, prior to any determination of the true wishes of the employees, would certainly delay, and perhaps defeat, the representation of employees by the bargaining agent of their choice. In these circumstances, the imposition of a bar could only be regarded as punitive. In our opinion, therefore, a bar should not be imposed in this case.

10. The request for costs also goes against the grain of this Board's previous practice. Previous decisions not only indicate that the Board has no general practice of awarding costs, but also raise the question of whether the Board has any procedural jurisdiction to make an order for costs. See *Dow Jones Ltd.*, [1970] OLRB Rep. June 382; *Joffre Lapointe & Sons Ltd.*, [1971] OLRB Rep. Sept. 621. On some occasions, however, the Board has made the payment of costs a condition for the granting of an adjournment. See *Metroplitan Toronto Apartment Builders' Association et al.*, [1970] OLRB Rep. Nov. 846; *R.T. Construction*, [1971] OLRB Rep. June 342. From these cases, it can be seen that the Board has not attempted to exercise any general power to award costs. This approach might be attributed to the fact that the Board has not been given any express power to award costs. It should be noted, however, that the general procedural jurisdiction, conferred by both section 91(2) of *The Labour Relations Act* and section 23 of *The Statutory Powers Procedure Act*, may be wide enough to encompass the power to award costs. Jurisdictional uncertainty, therefore, is not a particularly compelling explanation of the Board's reluctance to award costs. In our opinion, there is a much better reason for adopting a general practice of not awarding costs. The underlying purpose of *The Labour Relations Act*, as set out in its preamble, is to further harmonious relations between employers and employees through the collective bargaining process. The purpose is not well served by a procedure that usually requires the identification of a winner and a loser. The application of such a procedure, moreover, would be time-consuming, distracting the Board from its primary task of facilitating collective bargaining.

The awarding of costs, therefore, should not be extended beyond the situation where a party is being compensated for the expenses that would result from an adjournment to convenience another party. To extend this procedure any further would introduce an unnecessarily punitive element into the Board's procedures. The requests for costs are denied.

DECISION OF BOARD MEMBER J.E.C. ROBINSON, Q.C.:

While I am in agreement that the decision of my colleagues correctly reflects the previous jurisprudence and policy of this Board, I would have departed from such jurisprudence and policy and exercised my discretion within the provisions of section 92(2)(1) of the *Labour Relations Act* in imposing a six month bar upon the applicant to any future applications.

0869-76-U Antonio Melillo, (Complainant), v. Sheet Metal Workers' International Association Local 540, (Respondent), v. Barber Coleman of Canada Ltd., (Respondent).

Duty of Fair Representation – S60 – Whether ill-will required – Whether union may consider interests of group when considering conduct toward an individual – Whether union must process grievances to Arbitration –

Standard imposed by the Board in reviewing union decision.

BEFORE: A.L. Haladner, Vice-Chairman

APPEARANCES: *L. Bianchi for the complainant; B. Betteridge for the respondent union; E. Meuller for the respondent employer.*

DECISION OF THE BOARD: October 7, 1976

1. This is a complaint under section 79 of The Labour Relations Act wherein it was alleged that the respondent union had contravened the provisions of section 60 of the Act in failing to proceed to arbitration with respect to a grievance of the complainant against the respondent employer.

2. The complainant, Antonio Melillo, was dismissed by the employer on February 23, 1976. Ernest Meuller, the plant manager and the person responsible for the decision to dismiss, appeared on behalf of the employer and gave evidence that the complainant had been discharged for refusing to perform a work assignment which he was required by the terms of the collective agreement to perform. In explaining the rationale for the form of discipline selected, Meuller testified that the decision to fire Melillo had not been an easy one, but that it had been taken because he could have no assurance that the complainant would not repeat his misconduct. Meuller told the Board that this was not the first occasion that the complainant had refused a work assignment. In 1972 a similar incident had occurred. At that time, the matter had been recorded and discussed at length with both the complainant and the union. The Board was also advised that the complainant had been discharged in 1969 for a refusal to accept supervision. Meuller's evidence, which was confirmed by the union, was that Melillo's previous discharge had been upheld by an arbitration board, but that the employer had ultimately agreed to take him back provided the union agreed to impress upon him the importance of taking instructions.

3. Bob Betteridge, the union's business manager, gave the following account of the trade union's activities with respect to the processing of the complainant's grievance. At the outset, it should be noted that the grievance was taken through all of the steps in the grievance procedure short of arbitration. Betteridge's evidence was that he telephoned Meuller on February 23rd, immediately upon learning of the complainant's discharge, in order to ascertain the reasons for the dismissal. He was informed by Meuller at that time that the complainant had refused for a period of three and one-half days to perform a work assignment. Betteridge testified that he then personally interviewed the plant foreman who confirmed that the complainant had refused the assignment for the period in question.

4. Betteridge told the Board that he had kept in contact with the complainant right from the start and that he had kept him informed of the progress of his grievance. The evidence establishes that several weeks after the dismissal, Betteridge contacted Melillo on his own initiative and arranged for him to attend at a meeting which Betteridge had scheduled with Meuller to discuss the complainant's grievance. At that meeting, Betteridge attempted unsuccessfully to have the complainant reinstated.
5. The next event of significance occurred some time in March when the matter of the complainant's dismissal came before the executive of the union. The union's practice is to refer all unsettled discharge grievances to this body. The Board was informed that it was the unanimous opinion of the executive after considering the grievance, the reply of the company, and the results of Betteridge's interview with the foreman that Melillo did not have a case and that accordingly his grievance should not be taken to arbitration. The Board was also informed that the fact of the complainant's previous discharge was noted by the executive in the course of its consideration.
6. The complainant subsequently requested and was granted a personal meeting with the union executive. On June 7th, Melillo appeared before the executive to plead his case. After hearing his representations, the executive again voted unanimously against taking his grievance to arbitration.
7. The last event of significance occurred just ten days before the Board's hearing into Melillo's complaint that he had been unfairly represented. On that occasion Betteridge brought the matter of Melillo's discharge before the executive and asked them to reconsider their decision not to proceed to arbitration. The Board was informed that the executive decided against reconsideration.
8. In prosecuting his complaint against the trade union, the complainant did not adduce any evidence in respect of the union's conduct other than to state that it had not taken his grievance to arbitration. The entire burden of his evidence was that he had not been asked to perform the assignment that he was alleged to have refused and that he had therefore been dismissed without cause. The complainant called four witnesses in an attempt to provide the Board with corroboration of his contention that he had been unjustly dismissed. The first of these was Armando Rotandi, the plant foreman. Mr. Rotandi's recollection of the events surrounding the discharge was most unsatisfactory. But, for what it was worth, it tended to confirm the evidence of both the employer and the union and to cast doubt on the credibility of the evidence of the complainant.
9. Raffaello Desiantes, Tony Desiantes and Vicenzo Reale also gave evidence before the Board. Unfortunately, none of these individuals had any personal knowledge of the circumstances surrounding the complainant's dismissal.
10. Section 60 of The Labour Relations Act places trade unions under a duty not to "act in a manner that is arbitrary, discriminatory, or in bad faith in the representation of any of the employees in the [bargaining] unit".
11. The Board has already pointed out that the duty of fair representation was originally developed by the United States judiciary which came to conclude that the grant of power to a union to act as the exclusive bargaining representative, with its corresponding re-

duction of the individual rights of employees so represented, must carry with it some regulation of the manner in which this power was exercised in order to protect individual employees from abuse at the hands of the majority. Beginning with *Steele v. Louisville* (1944) 323 U.S. 192, a case involving racial discrimination by a union certified as the exclusive bargaining representative under the Railway Labor Act, the duty of fair representation was soon extended to all unions certified under the National Labor Relations Act (see *Ford Motor Co. v. Huffman* (1953) 345 U.S. 330). This judicial development culminated in the decision of the United States Supreme Court in *Vaca v. Sipes* (1967) 386 U.S. 171 which defined the scope of the union's duty of fair representation in these terms:

"Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or *discrimination* toward any, to exercise its discretion with complete *good faith* and honesty, and to avoid *arbitrary* conduct ... (at p. 18, 294).

A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is *arbitrary, discriminatory, or in bad faith*."

12. Under this language, which was adopted by the legislature of this province in 1971, a trade union is prohibited from engaging in three forms of misconduct in the representation of employees. In the *Walter Prinesdomu* case [1975] OLRB Rep. May 444, the Board had this to say about the prohibitions against bad faith and discrimination:

"... bad faith and discrimination describe conduct in a subjective sense – that an employee ought not to be the victim of the ill-will or hostility of trade union officials or of a majority of the members of the trade union ... Bad faith and discrimination constitute the outer limits of majoritarianism and official action, preventing a trade union from singling out certain individuals for unfair treatment. This aspect of the duty is particularly important in discouraging discrimination on the basis of race, creed, colour, sex, etc., preventing internal trade union politics from erupting into forms of invidious conduct; and in prohibiting extreme forms of interpersonal breakdowns within a trade union. It is basic to a system based upon an exclusive bargaining agent."

13. Section 60 requires not only that the actions of the exclusive bargaining agent be free of bad faith and discrimination, but also that it not act in an arbitrary manner. The statute recognizes that a trade union can act unfairly in the representation of employees even in the absence of subjective ill-will. The arbitrary component of the duty of fair representation has been interpreted by the Board as requiring the union to "put its mind" to the problem before it and attempt to engage in a process of decision-making that cannot be branded as implausible or capricious. Thus the Board in an enquiry under section 60 is required to make some kind of objective assessment of the quality of decision-making engaged in by the trade union (see *Prinesdomu* (supra)).

14. Most unfair representation complaints arise, as did this one, in the context of a union decision not to carry a grievance to arbitration. It is well established that the duty im-

posed on a trade union by section 60 does not require it to process through to arbitration every grievance which a bargaining unit employee wishes proceeded with. An employee has no absolute right to have his grievance arbitrated (see *Gebbie and Longmoore* 1973 OLRB Rep. 519). The key assumption underlying this legal conclusion is that the settlement of disputes and grievances of employees under the terms of a collective agreement is an extension of the collective bargaining process, a process in which the interests of particular individuals must of necessity yield to the *legitimate* interests of the group.

15. There are a number of institutional and practical reasons for allowing trade unions a discretion to decide whether a particular grievance should be taken to arbitration. Apart from the time and expense involved in processing frivolous and unmeritorious grievances, the Board has recognized that a trade union must concern itself with continuing a viable collective bargaining relationship with the employer which may well be undermined by the indiscriminate processing of grievances. As the U.S. Supreme Court put it in *Vaca*:

"In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration. Through this settlement process, frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedures. Moreover, both sides are assured that similar complaints will be treated consistently, and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved. And finally, the settlement process furthers the interest of the union as statutory agent and as coauthor of the bargaining agreement in representing the employees in the enforcement of that agreement. See Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601 (1956).

If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed to arbitration. This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully."

16. There is another group interest in the settlement of grievances which applies even to cases which might succeed at arbitration. This interest was given expression in *Rayonier and I.W.A.*, Local 1-217, [1975] 2 Canadian LRBR 196, a recent decision of the British Columbia Labour Relations Board interpreting a B.C. provision with language almost identical to our own. After adopting the Ontario position that an employee has no absolute right to have his grievance arbitrated, the B.C. Board stated:

"While a grievance may originally be brought by one individual, it is not unusual for it to involve a conflict with other employees as well as with the em-

ployer. Occasionally, this is true even in the facts of a particular case, but more often it arises from the implications of the general interpretation of the agreement upon which the particular grievor is relying. By necessity, a collective agreement speaks obliquely to many new and unforeseen problems arising during the course of its administration. Rather than relying on the arbitrator's interpretation of the vague language of the agreement drafted a long time ago, it is normally more sensible for the parties to settle that type of current problem by face-to-face discussions in the grievance procedure, with the participation of those individuals who are familiar with the objectives of the agreement and the needs of the operation and are thus best able to improvise a satisfactory solution. Again, if the employees are to have the benefit of this process and of the willing participation of the employer in it, the law must allow the parties to make the settlement binding, rather than allowing a dissenting employee to finesse it by pressing his grievance to arbitration. As Archibald Cox put it: 'Allowing an individual to carry a claim to arbitration whenever he is dissatisfied with the adjustment worked out by the company and the union treats issues that arise in the administration of a contract as if there were always a 'right' interpretation to be divined from the instrument. It discourages the kind of day-to-day co-operation between company and union which is normally the mark of sound industrial relations – a dynamic human relationship in which grievances are treated as problems to be solved and contract clauses serve as guideposts. Because management and employees are involved in continuing relationships, their disposition of grievances and the arbitrator's rulings may become a body of subordinate rules for the future conduct of the enterprise ... When the interests of several groups conflict, or future needs run contrary to present desires, or when the individual's claim endangers group interests, the union's function is to resolve the competition by reaching an accommodation or striking a balance. The process is political. It involves a melange of power, numerical strength, mutual aid, reason, prejudice, and emotion. Limits must be placed on the authority of the group, but within the zone of fairness and rationality this method of self-government probably works better than the edicts of any outside tribunal.' *Cox, Law and the National Labor Policy*, (1960) at pp. 83-38."

17. Since the incorporation of the fair representation doctrine into the Ontario Act, the Board has accumulated a considerable body of experience defining the kinds of situations in which it is permissible for a union to deny a grievor access to the arbitration process. Although the judgment in each case turns primarily on its own peculiar facts, the Board has evolved a couple of general guidelines by which the conduct of the trade union may be assessed. The first of these relates to the use which the Board will make of evidence regarding the merits of the grievance itself. In determining whether section 60 has been violated by the trade union, the Board has stated that it does not assume the posture of an arbitration board and adjudicate the merits of the complainant's grievance against the employer. While the Board does receive and consider evidence of all the circumstances surrounding the grievance, it does so for the limited purpose of determining whether the union has acted in an arbitrary, discriminatory, or bad faith manner in the representation of the complainant (see *Essex International of Canada Limited* (1972) OLRB M.R. 104). The policy behind this approach is not difficult to fathom. On the one hand, the fact that a grievance appears meri-

torious may lend credence to an employee's claim that he has been unfairly represented. For example, it may permit the Board to draw an inference of bad faith and/or discrimination in situations where the circumstantial evidence in respect of the union's motivation might otherwise prove inconclusive. On the other hand, the fact that a grievance does not appear to have merit will generally be supportive of the trade union's defence to an unfair representation complaint. (For a recent application of this principle, see the *Jay Sussman* case [1976] OLRB Rep. July 349). That is not to say, however, that the Board will never find a breach in circumstances where the complainant's grievance appears to lack merit (in this regard, see the *Joseph Papp* case (1974) OLRB M.R. 60). Nor is it to say that a meritorious grievance will necessarily be dispositive of the union's defence. The merits of the complainant's grievance is but one of a number of factors (albeit an important one) of which the Board may take account in arriving at a judgment about whether the union has dealt with his grievance in a proper manner. Among the other factors which the Board may consider are: the importance of the particular grievance to the employee concerned, the implications of a settlement or arbitration on the other members of the bargaining unit both now and in the future, whether there is any independent evidence of bad faith or discrimination, the degree of consideration given the grievance by the union, and the experience and qualifications of the trade union officials who have been involved in the processing of the grievance.

18. This brings me to the second general principle of adjudication which emerges from the Board's unfair representation jurisprudence. The Board has indicated on a number of occasions that it will attempt in reviewing the decision-making process of the union to avoid imposing a standard of conduct which does not conform to the realities of the particular situation at hand. As the Panel stated in *Gebbie* (supra):

"We recognize that union affairs are conducted for the most part by laymen. In some situations there are experienced full time officials of a trade union who conduct the union affairs; in other situations, the union affairs are conducted by employees in their spare time, while in yet other situations employees may be given a limited amount of paid time by their employers to engage in trade union matters. This Board does not decide cases on the basis of whether a mistake may have been made or whether there was negligence, nor is the standard based on what this Board might have done in a particular situation after having the leisure and time to reflect upon the merits. Rather, the standard must consider the persons who are performing the collective bargaining functions, the norms of the industrial community and the measures and solutions that have gained acceptance within that community."

19. The practical industrial relations consideration justifying this limitation on the scope of the union's duty was stated succinctly by the Supreme Court in the *Vaca* decision:

"... if a union's decision that a particular grievance lacks sufficient merit to justify arbitration would constitute a breach of the duty of fair representation because a judge ... later found the grievance meritorious, the union's incentive to settle such grievances short of arbitration would be seriously reduced. The dampening effect on the entire grievance procedure of this reduction of the union's freedom to settle claims in good faith would surely be substantial."

20. While the above interpretation of the union's duty leaves employees affected by mistakes and carelessness without a remedy under section 60, it still affords protection to an individual whose interests have been grossly disregarded by the union. This aspect of the duty of fair representation was recognized by the Board in *Prinesdomu* (supra). In that case, the Panel concluded that:

"... at least flagrant errors in processing grievances – errors consistent with a "not caring" attitude – must be inconsistent with the duty of fair representation. An approach to a grievance may be wrong or a provision inadvertently overlooked and s. 60 has no application. The duty is not designed to remedy these kinds of errors. But when the importance of the grievance is taken into account and the experience and identity of the decision-maker ascertained the Board may decide that a course of conduct is so implausible, so summary or so reckless to be unworthy of protection. Such circumstances cannot and should not be distinguished from a blind refusal to consider the complaint."

21. Following *Prinesdomu*, the Board has held that a trade union acts arbitrarily and thereby breaches its duty of fair representation if it fails to address itself to the particulars of an employee's grievance and disposes of it without regard to its merits (see *Zorzi and Nadaline* [1975] OLRB Rep. Oct. 791).

22. With this analysis of the legal framework for evaluating complaints under section 60, I can now examine the particular complaint before me.

23. The Board in this case was confronted with a direct conflict in the evidence respecting the circumstances preceding the complainant's dismissal. It will be recalled that the employer's evidence was that the complainant had refused a work assignment and that the complainant's evidence was that he had not been asked to perform the assignment and that he could not therefore have refused. This conflict in testimony can perhaps be explained by reference to some theory of misunderstanding or mistake, but quite frankly, I have considerable doubt as to whether the complainant's evidence can be given credence. However, it is unnecessary for me to make any conclusive determination on this point. For the purposes of this decision, it is sufficient to state that my appraisal of the situation after listening to the various accounts of what transpired is that Betteridge was told by both Meuller and the foreman that the complainant had refused a work assignment and that he had every reason to believe that this had in fact occurred.

24. While this determination does not necessarily entail the conclusion that the complainant's grievance would not have succeeded at arbitration, it does establish that the grievance was unlikely to have been perceived by the trade union in a favorable light; and it is against this background which the actions of the union must be assessed.

25. Agent for the complainant contended that the union's conduct in not proceeding to arbitration was arbitrary. He did not argue that the union had acted in either a bad faith or discriminatory manner. While he did not press the point, agent also suggested that the union might have acted arbitrarily at the lower levels of the grievance procedure.

26. There was simply no evidence before the Board which would support either of these allegations of arbitrariness. As regards the decision not to proceed to arbitration, the evidence establishes that this decision was a decision of the union executive and that that was in accordance with the past practice of the union. The evidence further establishes that the executive considered the matter of the complainant's dismissal on three separate occasions (on one of which the complainant was permitted to make personal representations) and, based upon its understanding of the existing facts and the complainant's earlier misconduct concluded that the complainant's grievance was unmeritorious and had little prospect of success.

27. Whether the union executive was correct in its assessment of the merits of the complainant's grievance is not at issue in these proceedings. The issue here is whether the executive applied its mind to the matter and arrived at a decision after due consideration. I find that it did. While it is unnecessary for me to go further, I am of the view that the decision which it reached was an eminently sensible one in the circumstances. If the union in this case had been required to proceed to arbitration, it would have done so to the detriment of the other bargaining unit employees, not only because of the expense involved, but also because of the likely damage to its credibility in the eyes of the employer.

28. The second allegation of the complainant – that the union may have acted arbitrarily in processing his grievance up to the final step – may be disposed of with equal dispatch. Bob Betteridge was the person responsible for this phase of the union's conduct. The evidence establishes that Betteridge's efforts on the complainant's behalf went far beyond the standard of representation prescribed by the legislation. Recall first that he made immediate enquiries of both Meuller and the foreman upon learning of the complainant's dismissal, that he kept in contact with the complainant from the beginning and arranged a personal meeting with the employer, that he attempted at that meeting to get the employer to change its mind and take the complainant back, and finally that he brought the matter of the complainant's dismissal before the executive just ten days prior to the Board's hearing and asked it to reconsider its decision not to proceed to arbitration. The latter conduct could be interpreted as self-serving, but in my judgment, it was rather illustrative of the fact that Betteridge was doing everything in his power to serve the complainant's interests irrespective of his personal opinion of the merits of his grievance.

29. The complaint is therefore dismissed.

0633-76-U Warehousemen and Miscellaneous Drivers Local Union No. 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (Complainant), v. **I.C.B. Warehousing Division of Alar-Anson**, (Respondent).

Discharge For Union Activity – Evidence – S79(4a) – Whether the complainant must make out a *prima facie* case or whether the entire burden of the case is born by the respondent from the beginning of the hearing – Effect of rules of statutory interpretation – Effect of pre-hearing screening procedures – Rules 29 and 46 – Effect of desirability of establishing an approach clear to a layman – Whether respondent required to present oral evidence at the hearing.

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members O. Hodges and J.E.C. Robinson, Q.C.

APPEARANCES: *Guy Beaulieu for the applicant; John P. Sanderson, Q.C. and Bill Nisbet for the respondent.*

DECISION OF PAMELA C. PICHER, VICE-CHAIRMAN AND BOARD MEMBER O. HODGES: October 26, 1976.

1. This is a complaint under section 79 of the Act that the grievor, Mr. Robert Lahaie, was dealt with by the respondent contrary to sections 56, 58, and 61 of The Labour Relations Act. He requests reinstatement with full compensation.

2. The evidence put before the Board may be summarized as follows: The complainant, proceeding first, called the grievor to the stand and asked him to identify his letter of termination as well as his severance and vacation pay cheques, record of employment and Ontario Health Insurance form. The letter of termination reads as follows:

“Dear Mr. Lahaie,

This is to inform you of our decision to terminate your employment with I.C.B. Warehousing due to a shipping error for K.S.H. Chemicals and poor general attitude in the past several months.

Please find enclosed, 1 weeks pay in lieu of notice, as well as your Record of Employment and OHIP form 104 and vacation pay.

Yours truly,

I.C.B. Warehousing”

On cross-examination by the employer, the grievor said that he didn't know about the alleged shipping error before receiving the letter and that he was never spoken to about his poor attitude. Following Mr. Lahaie's testimony the union called no further evidence. From this evidence the complainant has established Mr. Lahaie's employment status and discharge but has presented no evidence of his involvement in the union.

3. After the presentation of the union's case the employer decided not to call evidence.

4. Where there is a complaint of this nature under section 79 the provisions of section 79(4a) apply which put the burden of proof on the respondent company to prove that it did not act contrary to the Act. Section 79(4a) reads as follows:

“On an inquiry by the Board into a complaint under subsection 4 that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers’ organization did not act contrary to this Act lies upon the employer or employers’ organization.”

Because of the scant evidence presented to the Board by the complainant and the total absence of evidence presented by the employer, the outcome of this case may well turn on whether or not section 79(4a) requires that the complainant establish a *prima facie* case before it places the burden on the employer to show that it did not act contrary to the Act. Thus before the Board can weigh the evidence it must determine whether section 79 contemplates a single or double legal burden.

5. The union’s position for the interpretation of section 79(4a) is that there is no preliminary burden on the complainant to establish a *prima facie* case. The trade union argued that as soon as the inquiry by the Board commences section 79(4a) places the legal burden of proof on the employer to show that it did not act contrary to the Act. In other words, the union asked the Board to find that once the hearing begins the entire burden of the case is borne by the employer. i.e. that there is only one burden of proof from the beginning to the end of the case. Applying this principle to the evidence of this case, the union argued that the employer did not discharge its burden because it did not offer an adequate explanation for the discharge.

6. Counsel for the employer, on the other hand, argued that section 79(4a) contemplates two legal burdens of proof. The employer’s position is that before the employer is required to bear the burden of proving that there was no violation of the Act, the complainant must establish a *prima facie* case of violation in order to bring itself within the scope of section 79. Relating this principle to the instant case, therefore, the employer asserted that the complainant had to establish employment status, discharge, and some degree of union activity before the employer would be required to prove that Mr. Lahaie was not discharged for union activity. Because the complainant failed to tender any evidence of union activity the employer asked the Board to find that the complainant failed to discharge its preliminary burden and thus that the burden of proving non-violation of the Act never fell to the employer.

7. The contrast in the two positions may be highlighted by noting the outcome of applying them to the extreme situation of neither party presenting any evidence. If the union’s position of a single burden prevails, then if neither party presents evidence the employer would lose; if the employer’s position of a dual burden prevails then in the same situation the complainant would lose.

8. Since the word “burden” has been used in legal writing and decisions to encompass a variety of types of burdens, each with different consequences, it is perhaps useful before going further to clarify the type of burden that is in question in this case. There are

two basic types of burdens. The first is known as the "legal" burden of proof and is defined by R. Cross in the 4th edition of his book, *Evidence* (1974) at p. 95 as "the obligation of a party to meet the requirement of a rule of law that a fact in issue be proved [or disproved] either by a preponderance of evidence or beyond reasonable doubt as the case may be." The second type of burden is termed the evidentiary burden which Cross defines as "the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non existence of a fact in issue ..." Sopinka and Lederman at p. 397 of their book, *The Law of Evidence in Civil Cases*, explain this secondary burden as follows: "If one party has led evidence or is aided by a presumption which entitles the judge or jury to find in favour of that party, then it may be said that a secondary burden rests on the opposite party of 'going forward' with some evidence to overcome the effect of the evidence or of the presumption."

9. Before the advent of section 79(4a), i.e. before the Legislature placed a legal burden on the employer, the complainant bore the only legal burden of the case. The jurisprudence established, however, that in those pre-section 79(4a) situations there was a shift in the evidentiary burden once the complainant established certain facts. In a discharge case, for example, the shift in the evidentiary burden occurred requiring the employer to come forward with additional evidence when the complainant established employment status, discharge and the possibility of employer knowledge of union activity. (See *Cyrville Chrysler Dodge Limited*, [1970] OLRB Rep. Mar. 1466; *Manis Metal Manufacturing Ltd.*, [1969] OLRB Rep. Aug. 645; *National Automatic Vending Co. Ltd.*, 63 CLC para. 16,278.

10. With section 79(4a) the Legislature changed this allocation of the burdens by placing a legal burden on the employer. The obvious difference for the employer is that now the risk of non persuasion after all the evidence is in is on the employer, not on the complainant. Because the Legislature has made it clear that the employer bears a legal burden the only question in this case is whether the complainant has retained a portion of its previous legal burden by being required to prove on the balance of probabilities the existence of certain facts, namely, employment status, discharge, and, more important to this case, either some degree of union activity on the part of the grievor or evidence from which the Board could infer an anti-union motive for discharge.

11. Lengthy legal debates have centered on the question of whether a legal or ultimate burden can ever shift. The question in such a debate concerns the commencement of the second burden, i.e. whether the admitted two burdens co-exist from the outset with the second burden being engaged as the first is being discharged, or whether only one burden exists throughout the case with that burden shifting from the first party to the second party once the burden has been discharged by the first party. (See Cross, *supra*, p. 80 et seq. and Sopinka and Lederman, *supra*, p. 395 et seq.) Since the question for the Board in this case concerns whether in a case to which section 79(4a) applies there are in fact two burdens, and does not concern the timing of the commencement of a second burden, it is unnecessary for the Board to address this argument except to establish its irrelevance to the issue at hand.

12. The determination of whether the position of the employer or the complainant should prevail, i.e. whether there are one or two legal burdens in section 79(4a), depends on the proper construction of section 79(4a). Professor E.A. Dreidger's book, *The Construction of Statutes* (1974), at page 81, sets forth the steps that should be followed to best ascertain

the intention of Parliament in passing any legislation. As the author admits at p. 82, the "intention of Parliament" is "in a sense, a fiction" but he asserts, and we accept, that it must at the same time serve as the guiding light in the construction of statutes. Because of the need to clearly organize the many factors which must be considered in interpreting section 79(4a), the Board has adopted Professor Dreidger's first three steps (which are sufficient for our purposes) to achieve the most appropriate interpretation of the statute. They are as follows:

"(1) The Act as a whole is to be read in its entire context so as to ascertain the intention of Parliament (the law as expressly or impliedly enacted by the words), the object of the Act (the ends sought to be achieved), and the scheme of the Act (the relation between the individual provisions of the Act).

(2) The words of the individual provisions to be applied to the particular case under consideration are then to be read in their grammatical and ordinary sense in the light of the intention of Parliament embodied in the Act as a whole, the object of the Act and the scheme of the Act, and if they are clear and unambiguous and in harmony with that intention, object and scheme and with the general body of the law, that is the end.

(3) If the words are apparently obscure or ambiguous, then a meaning that best accords with the intention of Parliament [in passing the subsection], the object of the Act and the scheme of the Act, but one that the words are reasonably capable of bearing, is to be given."

13. Step 1 directs that to decide whether the words of a particular section are clear or ambiguous the Act must first be read as a whole so that the words can gather flesh from their overall context. Section 79(4a) must therefore be read against the backdrop of both the Legislature's declared intention in passing the Labour Relations Act as set out in the preamble, and section 79(4a)'s placement within the general scheme of the Act. The preamble states,

"Whereas it is in the public interest of the Province of Ontario to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees."

To achieve this end of promoting good employer/employee relations through facilitating collective bargaining, the Legislature prohibited those union and employer practices it considered unfair - unfair in the sense of inhibiting the proclaimed object of the Act. More specifically for our purposes, in section 58(a), among other practices, it proclaimed that no employer could refuse to continue to employ a person because of union activity. Since a probation without the means of enforcement is ineffective, the Legislature provided in section 79 the enforcement machinery for unfair labour practices. Sub-section 79(4a) is the procedural portion of this machinery which alters the ordinary burden of proof for certain of the complaints of unfair labour practices which come under section 79 - one of which is discharge for union activity.

14. Turning to step 2, the words of the individual section are to be read in their grammatical and ordinary sense as illuminated by the intention and scheme of the Act. If in that context the meaning is clear then the meaning is ascertained; if not then step 3 must be taken.

15. Section 79(4a) states that “on an inquiry by the Board into a complaint ... that a person has been discharged ... the burden of proof that any employer ... did not act contrary to this Act lies upon the employer.” (emphasis added). Whether the language of section 79(4a) clearly establishes that the complainant retains a preliminary burden of proving a threshold case or whether instead it establishes that the employer bears the entire burden of the cases, depends primarily on the meaning of “on”, the initial word of the subsection. If “on” means “at the moment of” then the finding of a single burden would follow automatically because the wording would not leave room for the retention by the complainant of a preliminary burden. On the other hand, if “on” means “during” then although the finding of a double burden would not be inevitable, it would be consistent with the wording of the legislation. “During” is sufficiently broad so as not to exclude the possibility of the applicant retaining a preliminary burden. Unfortunately the dictionary definition of “on” is of little assistance in resolving the matter because both meanings are included. *Black’s Law Dictionary* defines “on” as including either “upon” or “as soon as” on the one hand, or “in” or “during” or “following upon” on the other hand.

16. Reading section 79(4a) within the context of the object and scheme of the Act as a whole does not eliminate either one of the above grammatical and ordinary interpretations of the word “on”. Section 79(4a) is a procedural sub-section the function of which is to indicate the existence of the reverse burden. (See *The Barrie Examiner*, [1975] OLRB Rep. Oct. 745). Because with either interpretation of “on” the employer bears the major burden of the case, both are in sympathy with the placement of the subsection within section 79, the enforcement section of the Act, and therefore either interpretation would be in harmony with the Act as a whole. The result of following step 2, therefore, is the discovery that the wording of section 79(4a) is ambiguous and that additional consideration is required.

17. By way of contrast and before going on to step 3, it is interesting to note the wording of the reverse burden section of the Saskatchewan Labour Relations Act in respect of which it has been found that the legislation contemplates the existence of two burdens rather than just one. Section 11(1)(e) reads:

“It shall be an unfair labour practice for an employer ... to discriminate in regard to ... tenure of employment ... or to use coercion or intimidation of any kind, including discharge ... and if an employer ... discharges ... an employee from his employment and it is shown to the satisfaction of the Board that employees of the employer ... were exercising ... a right under this Act, there shall be a presumption in favour of the employee that he was discharged ... contrary to this Act, and the burden of proof that the employee was discharged ... for good and sufficient reason shall be upon the employer ...”

In *Re Sisters of Charity, Providence Hospital and Labour Relations Board et al.*, [1951] 3 DLR 735 the Saskatchewan Court of Appeal decided that the presumption under the reverse onus provisions arises only if a *prima facie* case is first made out. Unlike the situations at hand,

the finding of two burdens under the reverse onus provisions of the Saskatchewan Act is the direct result of clear and unambiguous language. Unlike section 79(4a) of The Ontario Labour Relations Act, the above quoted section clearly indicates that there is a condition precedent to the burden falling to the employer, i.e. it states in unambiguous language that the complainant must first show both that the employee was discharged and that the employee was exercising a right under the Act.

18. Step 3 states that in the face of ambiguity the words should be given the meaning which best accords with the intention of Parliament in passing the sub-section, the object of the Act and the scheme of the Act.

19. Looking first at the intention of Parliament in passing section 79(4a), we note that it was introduced into the Act to meet a specific problem in the adjudication of certain unfair labour complaints. For those cases referred to in section 79(4a), the employer is in the position of being in unique possession of knowledge of the subject matter of the allegation, knowledge not possessed by the complainant. (See *Cyrville Chrysler Dodge Ltd.*, *supra*. For example, using the situation in issue in the instant case, the employer is the only party knowing the real reasons for the employee's discharge. Thus when the issue is whether or not the employee was discharged for union activity contrary to the Act, the employer, not the complainant, is the party who can best produce the evidence which would lead to a resolution of the matter. In the face of the employer's unique possession of knowledge of the real reasons for discharge, it was decided by the Legislature that justice would be more readily achieved by requiring the employer to prove that it did not act contrary to the Act rather than by requiring the complainant to prove that the employer's actions were stimulated to some degree by anti union *animus*.

20. If the full extent of the Legislature's intention in passing section 79(4a) was to shift the burden to the employer because of its knowledge of the facts in issue, then the finding of either one or two burdens would further that intention. No matter what decision is made by this Board as to the number of burdens, it is the employer, not the complainant, that will be charged with the burden at the end of the case. On the other hand, if in furtherance of this general end of shifting the burden of proving non-violation to the employer, it was also Parliament's intention to require the employer in all cases to give an explanation for the discharge, then the finding of a single burden would be required for the fulfillment of Parliament's intention. If the complainant must first establish a *prima facie* case, then, as in the case at hand, the employer would not necessarily have to bring forth an explanation for discharge but could rest with the argument that the complainant had not established a *prima facie* case.

21. Because either of the above suggested intentions of the legislators in enacting section 79(4a) is plausible, a consideration of the first branch of step 3 (the Legislature's intention) does not resolve the matter. The Board must therefore consider the scheme of the Act and the object of the Act.

22. By way of introduction to a consideration of the scheme of the Act and because the following principles aid the Board in placing significance on that scheme, we will take a collateral look at the general principles which determine the placement of the legal burden.

23. A burden reversal such as effected by the introduction of section 79(4a) on the ground of unique possession of knowledge is in direct accord with the second of two principles governing the placement of the burden which are set out in Sopinka and Lederman at p. 395:

“... the allocation of the ultimate burden of proof is determined by the substantive law ... upon broad reasons of expedience and fairness. The basic premises, however, underlying this allocation are:

- (1) That the onus is always on a person who asserts a proposition of fact which is not self evident, and
- (2) That where the subject matter of the allegation lies particularly within the knowledge of one of the parties that party must prove it, whether it be of an affirmative or negative character.”

For convenience these principles will hereinafter be referred to as principle #1 and principle #2.

24. Although it is beyond question that the Legislature has placed a legal burden upon the employer and thus although it is of only academic interest that the shift is in sympathy with basic burden placement principle #2, an understanding of these principles and their underpinings may assist the Board in deciding whether the Legislature intended, in recognition of principle #2 (employer knowledge), to place the entire burden of the case on the employer, thus sacrificing principle #1 (the allegor must prove) to principle #2 [which would result in a reversal of the pre-section 79(4a) situation wherein principle #2 was sacrificed to principle #1], or whether in recognition of the co-existing importance of principle #1 the Legislature intended that a preliminary portion of the burden remain with the complainant. In other words, an examination of the composition of these principles may help us to decide whether section 79(4a) has made considerations of employer knowledge (principle #2) paramount to the concept that an allegor must prove (principle #1) which would result in one burden or whether section 79(4a) has provided a place for both principles to co-exist which would result in a finding of two burdens.

25. Ordinarily these two principles lead to a single burden. Normally the person who alleges is also the person who has particular knowledge of the facts to be proved; thus within the framework of the basic proposition of law that a person is innocent until proven guilty, the burden is normally on a complainant, not on a respondent. The split in the above two principles for those section 79 matters which fall within the scope of section 79(4a) complicates the determination of the placement of the burden in the situation at hand.

26. However, if the Board were to decide that there are two burdens then both principles would be accommodated. The complainant as the allegor would have to prove a *prima facie* case after which the employer as the special holder of knowledge of the facts in issue would have to prove non-violation of the Act. The weight that should be given to this accommodation of both burden placement principles depends, however, on whether or not the converse finding i.e. that section 79(4a) contemplates only one burden, would result in a sacrifice of principle #1 to principle #2.

27. Enroute to deciding whether the findings of a single burden will result in the sacrifice of principle # 1, we will consider firstly the underpinning of this first principle and secondly the scheme of the Act.

28. Two factors underlie the principle that he who asserts must prove: firstly the basic position that a party is innocent until proven guilty and thus that it is for the allegor to prove its allegation, and secondly, the interest of the legal system and the respondent in the avoidance of undue harassment and vexatious claims. The first purpose of principle # 1, that being to further the conviction that it is for an allegor to prove guilt rather than for a respondent to prove innocence, has been legislatively sacrificed by any reading of section 79(4a) and thus does not concern the Board. On the other hand, the second support for principle # 1 (avoiding vexatious claims) has not necessarily been sacrificed and because of the merit of deterring frivolous claims and employer harassment, it should not be abandoned without good cause. A look at the scheme of the Act as a whole as suggested in step 3 is most helpful in deciding whether a finding of a single burden would erase the deterrent embedded within burden placement principle # 1. If in the absence of the safeguards which emanate from an obligation on a complainant to establish a *prima facie* case there are still sufficient safeguards in the Act which protect against vexatious claims, then the above posited rationale for requiring the complainant to prove a *prima facie* case (that being that it would accommodate both burden placement principles) would be substantially diminished if not eliminated for the reason that it would be balanced by a similar such accommodation resulting from a single burden.

29. To obtain insight from the scheme of the Act as a whole, the Rules of Procedure must be considered as well as the provisions of the Act itself. Section 79 states that where a complaint alleges a violation of the Act, the Board may (as it invariably does) authorize a Labour Relations Officer to inquire into the complaint, endeavour to effect a settlement and report his results to the Board. Rule 29 of the Board's Rules of Procedure describes in more detail the role of the Labour Relations Officer when authorized by the Board to act under section 79. Rule 29 reads as follows:

"29. (1) Where the Board authorizes a labour relations officer to inquire into a complaint, the labour relations officer shall meet with the complainant.

(2) Where the labour relations officer has met with the complainant he shall,

(a) report his findings to the Board and the Board shall,

(i) deal with the complaint pursuant to section 46, or

(ii) refer the complaint back to the labour relations officer;

or

(b) deliver a copy of the complaint to the respondent and each interested party named in the complaint and such other persons as the Board may direct.

(3) Where, pursuant to clause b of subsection 2, the labour relations officer delivers copies of the complaint he may meet with the parties and shall,

(a) report his findings to the Board and the Board shall,

(i) deal with the complaint pursuant to section 46, or

(ii) refer the complaint to the registrar who shall serve the complainant, the respondent, each interest party named in the complaint and such other person as the Board may direct with a notice of hearing in Form 7;

or

(b) refer the complaint to the registrar who shall serve the complainant, the respondent, each interested party named in the complaint and such other person as the Board may direct with a notice of hearing in Form 7.

Rule 46 referred to in both rule 29(2)(a)(i) and rule 29(3)(a)(i) describes the role of the Board's screening panel which may dismiss an application without a hearing when a complainant does not make out a *prima facie* case:

46. (1) Where an application or complaint does not, in the opinion of the Board make out a *prima facie* case for the remedy requested, the Board may dismiss the application or complaint without a hearing and it shall in its decision state the reason for dismissal.

(2) The applicant or complainant may within ten days after he is served with the decision of the Board under subsection 1 request the Board to review its decision.

(3) A request for review under this section shall contain a concise statement of the facts and reasons upon which the applicant relies.

(4) Upon a request for review being filed, the Board may,

(a) direct that the application or complaint be re-opened and proceeded with by the Board in accordance with the provisions applicable thereto;

(b) direct the registrar to serve the applicant and any other person who in the opinion of the Board may be affected by the application or complaint with a notice of hearing to show cause why the application or complaint should be re-opened; or

(c) confirm its decision dismissing the application or complaint.

30. The Act and its Rules, therefore, contemplate two procedures for weeding out groundless claims. Under rules 29(1) and 29(3) the officer is directed to meet with the complainant and parties respectively. If from those meetings the officer discerns, among other possibilities, that the claimant either has improperly sought relief under the Labour Relations Act when the remedy is provided within the framework of another Act, or that the complainant has named the wrong party, or that the claim is the obvious result of a misunderstanding, or that the claim is groundless, the Labour Relations Officer may effect a solution by prompting either a redirecting of the action to the proper forum, a correcting of the style of cause, a settlement of the misunderstanding or a withdrawal.

31. If the complaint goes beyond the inquiry of the officer then the Board may deal with it under rule 46 in its role as a pre-hearing screening panel. Where in the opinion of the Board the complaint does not make out a *prima facie* case, the Board may dismiss the case without a hearing. Because of the role of the Board's Labour Relations Officers and its screening panel, the Board is given substantial protection from having groundless claims reach the hearing stage. This is not to say that no groundless claims reach the hearing stage. Indeed, there may be reasons of long term efficiency, cost saving and sound labour relations which make it better for all concerned to allow some persons their "day in court" despite a lack of substance to their claim.

32. Given the protections against vexatious claims and employer harassment provided the Board through section 79 of the Act and rules 29 and 46 of the Rules of Procedure, it would be inaccurate to assume that the finding of a single legal burden in section 79(4a) would result in the sacrifice of that branch of burden allocation principle #1. A consideration of the scheme of the Act therefore, illustrates that both burden placement principles will be accommodated by a finding of either one or two legal burdens in section 79(4a). If one burden is decided upon, then protection against vexatious claims comes from the Board's pre-hearing procedure; if two burdens are found to be appropriate then such protection comes as well from the requirement on the complainant to meet a *prima facie* case. Thus what appeared at first glance to be a forceful argument for the finding of two burdens (the recognition that the finding of a double burden would accommodate both principles) diminishes in importance upon a consideration of the scheme of the Act which shows that the finding of a single burden will also achieve this accommodation, though by different means. Once again therefore, additional efforts must be made to resolve the question.

33. In moving on to the final branch of step 3, a consideration of the object of the Act, a situation has emerged which can be summarized as follows: The Legislature has shifted the legal burden of proving non-violation of the Act to the employer. In phrasing the amendment, however, the Legislature has not clarified its intention as to whether there should be a double or single burden: "on" is an ambiguous word which could support either result. The general purpose of the amendment, that being to require the employer, because of its unique possession of knowledge of the facts in issue, to prove possession of knowledge of the facts in issue, to prove non-violation is clear: however this general object is realized through the finding of either one or two burdens and thus does not resolve the matter. It may be, however, that in enacting section 79(4a) the Legislature intended, in addition to the above stated general purpose, to require the employer to in all cases come forward with an explanation. This object would require the finding of a single burden. Finally, a consideration of the scheme of the Act indicates that neither a single burden nor a double burden will result in the sacrifice of burden allocation principle #1 to principle #2: the normal justifi-

cation for complainants going first is dissipated by the fact that through its pre-hearing procedures the Board enjoys considerable protection from vexatious claims and the employer is protected, though not completely, from harassment. Having proceeded along the path suggested by Professor Driedger, we are left to a determination of whether the general object of the Act will more fully be served by a single or a double burden in section 79(4a).

34. The object of the Act as set out in the preamble and as stated earlier is to promote "harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining." Thus it is from this perspective that the effects of either interpretation must now be evaluated.

35. If the Board were to decide that section 79(4a) contemplates two burdens, then because the complainant would be required to establish a *prima facie* case, the complainant would ordinarily proceed first. Ideally, once, and only if, the complainant discharged its initial burden would the burden then fall to the employer to proceed in its job of proving non-violation of the Act. Practical difficulties cloud the two burden procedure. It would be difficult, if not impossible, for the complainant to know when it had presented enough evidence to insure the Board's finding of a *prima facie* case; thus to safely meet its burden the complainant would inevitably wish to present more than enough evidence. Because of the uncertainty over where to break off, the proceedings would run the risk of having the complainant prove its whole case, and not merely a *prima facie* case, before the employer would proceed. A further difficulty is that the employer, the party bearing the major burden of the case, would have no right of reply. Normally, and quite properly, the party who bears the burden should be entitled to the final presentation of evidence by way of reply evidence and the final presentation of argument by way of reply argument. As only one party can have the final say it should be that party who bears the final burden. This departure from the normal alignment of the burden with the procedure would be inevitable with two burdens. The parties would have to understand and accept that even though it is the complainant that proceeds first and has the right of reply, it is actually the employer who bears the major burden of the case.

36. Although legally trained minds could readily distinguish the placement of the employer's burden from the order of proceeding, and thus be secure in the knowledge that it is the employer who bears the major burden although the union proceeds first, the distinction is not so readily made by others. For others an understandable reaction would be either confusion over who actually bears the major burden of the case or a scepticism that the Board will in fact look to the employer not the complainant to tip the scales when all the evidence is in. This is precisely the kind of reaction which should, if possible, be avoided because it inhibits rather than promotes harmonious relations between the parties. Collective bargaining suffers to the extent that the parties are confused or are uncertain that they are receiving fair treatment. The Labour Relations Act and the procedures within it were not enacted for the benefit of lawyers. Employees, employers and union representatives would be ill-served by the confusion engendered by a double burden. It is the decision which leads to clarity and trust rather than scepticism and confusion which will best fulfill the objects of the Act.

37. Requiring the union to go first to meet its burden of showing a *prima facie* case when it is the employer who bears the major burden of the case may also in certain situations be wasteful. If the union proceeds first to meet its burden of showing a *prima facie* case and then because of practical difficulties in knowing where to stop presents its whole case, it

will naturally put forward its best and most thorough effort. If the employer in fact has scant means of discharging its burden of showing a non-violation of the Act, then unnecessary evidence may have been presented. Certainly it is in all parties' interest to avoid procedures which promote inefficiency and a waste of time through the presentation of unrequired evidence.

38. In the final analysis therefore, to best promote the object of the Act section 79(4a) must be seen to contemplate a single burden, that burden being the burden it expressly places upon the employer.

39. Having completed Professor Dreidger's three steps, the Board finds that in enacting section 79(4a) the Legislature intended that there be only one burden in those cases falling within that section, a burden on the employer which operates at the end of the case. It therefore follows that a complainant is not required to establish a *prime facie* case before the employer must give a credible explanation for discharge or present any other evidence which if taken alone would be sufficient to satisfy the Board that it did not act contrary to the Act. Having made this determination, however, it must also be observed that although the complainant is not required at the outset of the case to show employment status, discharge, or union activity, its failure to establish these crucial facts could prove fatal to its case. For example, an employer might readily discharge its burden by relying on the absence of evidence from the complainant of the grievor's employment status or his discharge, or, turned around, by affirmatively showing a lack of employment status or discharge. Additionally, failure to bring forth evidence of union activity or other evidence from which an anti-union motive could be inferred might be at the complainant's peril even though it is the employer who bears the legal burden of the case. In *F.W. Woolworth Co. Ltd.*, [1976] OLRB Rep. April 148 at p. 153 the Board made the following observation concerning the complainant's obligation to produce evidence of union activity.

"The reverse onus provisions of the Labour Relations Act do not necessarily excuse a complainant from coming forward with its best evidence with respect to the breadth and scope of its organizational campaign. Such evidence is crucial with respect to imputing employer knowledge, if any, of that campaign and the participants thereto especially, in the face of *prima facie* evidence of a credible excuse for the termination. The substance of the progress of a trade union's organizational campaign is something peculiar to the knowledge of a trade union and its representatives. Failure to adduce evidence that is so relevant to the trade union activities for which the grievors were allegedly discharged is at a complainant's peril."

More recently in *The Board of Education for the Borough of York*, (Board File No. 0575-76-U, decision dated September 27, 1976) the Board at p. 8 again referred to the complainant's obligation:

"In proceedings under section 79(4a) of the Act when an employer has adduced evidence that, standing by itself, would tend to satisfy the Board that the employer did nothing to breach the Act the complainant may bear a tactical burden to rebut the employer's case. He or she may succeed in casting doubt upon the employer's case by adducing evidence of a contemporaneous anti-union campaign by the employer or of such other facts that would cause the Board to question the sincerity of the employer's explanation."

Both these cases indicate that once the employer has placed before the Board a credible explanation which if taken alone would satisfy the Board that the employer did not act contrary to the Act, the complainant, if it is to succeed in its complaint, must come forward with evidence which would case the Board to doubt the genuineness of the reasons given.

40. In assessing the evidence in the instant case, we note that the complainant did not bring forth any evidence of union activity on the part of the grievor, or any other evidence from which an anti-union motive might be inferred. If the employer through the letter of discharge established a credible explanation then the absence of such evidence might well be at the complainant's peril. If the employer's letter is not by itself sufficient, however, then it can be said that during the course of the hearing the tactical burden of coming forward with evidence to dispute the genuineness of the reasons never shifted to the complainant, i.e., the absence of evidence of union activity would not then be at the complainant's peril.

41. Several cases provide the Board with guidance as to exactly what the employer must have established by the end of the case to discharge its burden. In *The Barrie Examiner*, [1975] OLRB Rep. Oct. 745 at p. 749 the Board sets out two requirements:

"Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts – first, that the reasons given for the discharge are only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred."

Putting the relevant considerations in other terms, the Board in *Fielding Lumber Company Limited*, [1975] OLRB Rep. Sept. 665 at p. 673 states:

"Thus the Board need not find that an employer's sole reason for acting stems from the union activity of his employees to find a violation of the legislature but rather an employer must satisfy the Board that union activity played neither a major or minor role in regard to its impugned actions."

42. The above quoted cases indicate that to discharge its burden the employer must satisfy the Board that its reasons for discharging the grievor were free of any anti-union taint. In *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299 p. 301 the Board commented on the best means the employer has for discharging this burden:

"The employer best satisfies the Board in this regard [that there does not co-exist in the mind of the employer an anti-union motive] by coming forth with a credible explanation for the impugned activity which is free of anti-union motive and which the evidence establishes to be the only reason for its conduct."

43. A letter of discharge setting forth two reasons for dismissal was submitted in evidence by the complainant presumably for the limited purpose of proving the fact of discharge and employment status. During argument before the Board, however, after the presentation of evidence, counsel for the company took the position that the letter provided the

Board with sufficient evidence to show that the employer did not violate the Act, i.e. to show that the reasons for discharge were free of an anti-union taint. The Board rejects the company's suggested view of the evidence. The letter, by itself has no evidentiary value for the employer; it is self serving document which goes no distance towards proving the genuineness of the reasons given therein. The letter is totally insufficient for establishing that the reasons given in that letter were the only reasons for discharge, i.e. that the actual reasons for discharge were devoid of anti-unionanimus. And this is particularly so where, as here, the *viva voce* evidence of the grievor raises some doubt as to the appropriateness of the stated reasons for the discharge. Except in exceptional circumstances, of which this is not one, the employer, in order to provide the Board with a credible explanation which if uncontradicted would satisfy the Board of its non-violation of the Act, must, in addition to the presentation of any documentary evidence, give substantiating oral evidence and be subject to cross-examination. It is only through this procedure that the Board can assess the credibility of the employer and test genuineness of the reasons evidence and relied solely on the letter as submitted by the complainant, the Board has no probative evidence of a credible explanation by the employer for the discharge of Mr. Lathaie.

44. Having regard to all of the evidence therefore, the Board is left in doubt as to whether or not the grievor was discharged for union activity. Given the reverse burden provision of section 79(4a), when the Board entertains such doubt at the end of the case, it must resolve the doubt in favour of the complainant.

45. Accordingly, the Board directs that the respondent forthwith reinstate Mr. Robert Lahaie in the same position and with the same working conditions and benefits which he had on the date of his discharge and that he be compensated for lost wages. The Board remains seized of the matter to deal with any disagreement that may arise between the parties with respect to the assessment of compensation or any other aspect of the implementation of this order.

DECISION FO BOARD MEMBER J.E.C. ROBINSON, Q.C.:

I dissent from the decision of the majority. My reasons therefor will be given at a later date.

0645-76-U Keith Sutherland, (Complainant), v. The Ontario Municipal Employees Retirement Board, (Respondent), v. Canadian Union of Public Employees, Local 1923, (Intervener).

S79 – Arbitration – Whether the Board will defer to a Board of Arbitration when both tribunals have jurisdiction.

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members J.D. Bell and A. HersHKovitz.

APPEARANCES: Elliott G. Posen for the applicant; Allan W. Reeve, Gerald A. Tyson, Michael Beswick and A.D.G. Purdy for the respondent; Kent Mitchell for the intervener.

DECISION OF THE BOARD: October 21, 1976

1. This is a complaint under section 79 of The Labour Relations Act wherein it is alleged that the grievor, Mr. Keith Sutherland, has been dealt with by the respondent contrary to the provisions of section 58 of The Labour Relations Act.

2. The parties agreed that a grievance of this complaint had been filed by the complainant in accordance with the grievance procedure under the existing collective agreement, that an arbitration board had been established and that the hearing was set for October 1, 1976. Without contradiction from the complainant, the respondent counsel further pointed out that the relief sought through the instant application was similar, if not identical, to the relief sought through arbitration.

3. Counsel for the respondent made the preliminary objection that this Board should not entertain this complaint on the ground that a board of arbitration would provide the more proper forum for the resolution of the dispute.

4. Counsel for the complainant, on the other hand, asked the Board to proceed on the ground that the arbitration process would not effect a proper resolution of the dispute for two reasons: firstly, because in arbitration the grievance would fail on a technicality (timeliness), and secondly, because the arbitration had been withdrawn. From statements made to the Board it appears that the withdrawal was made to attain the increased efficiency and lower costs that could result from coming before this Board, as well as to avoid the anticipated dismissal of the arbitration because of the technicality. Although the complainant indicated that notice of the withdrawal had been given to the arbitration nominees, the respondent stated that the company had heard nothing of the withdrawal before this hearing.

5. After hearing argument on the issue of whether the Board should defer to the arbitration process, the Board ruled that for reasons to follow in writing, it would not entertain the complaint. After delivering the decision, the respondent gave the complainant an undertaking to do whatever was necessary to bring the matter to arbitration, i.e. the respondent agreed to ignore the complainant's withdrawal of the arbitration. The Board's reasons for dismissing the complaint are as follows:

6. The complaint in the instant application under section 79 alleges a breach of The Labour Relations Act. Accordingly, it is clearly within the Board's jurisdiction to hear the matter. The Board is the very body charged with the responsibility for enforcing and administering the Act; as such, it may hear any violation of it. (See *Imperial Tobacco Products (Ontario) Limited*, [1974] OLRB Rep. July 418 at p. 433). Having said that, however, because of the existence of the word, "may" in section 79, the Board also has the ability to decline to hear a section 79 complaint, and this it has repeatedly done when of the opinion that it should defer to arbitration. The Act imposes grievance arbitration on the parties to a collective agreement. If the Board were to regularly entertain complaints which might otherwise be arbitrated, it would undermine its own Act in that it would cripple the very process it has imposed on the parties. (See *Imperial Tobacco*, supra; *Sunnybrook Food Market (Keele) Ltd.*, [1972] OLRB Rep. March 210; *Collingwood Shipyards Ltd.*, [1967] OLRB Rep. July 376; *National Showcase Co. Ltd.*, 61 CLLC para. 16,185).

7. The Board has consistently held, however, that it will hear the complaint itself rather than defer to arbitration if the complainant establishes exceptional circumstances. Among other possibilities the Board will hear a complaint that might otherwise be arbitrated in the following situations: if there is an allegation of collusion or connivance (see *Imperial Tobacco, supra; Sunnybrook Food Market, supra; Collingwood Shipyards, Supra; Pitt Street Hotel Ltd.*, 63 CLLC para. 16,275), if the union refuses to process the grievance or press it to a conclusion (*Imperial Tobacco, Sunnybrook, Collingwood*), if the arbitration board finds that it has no jurisdiction to deal with the matter such that the grievor would be left without a remedy (*Collingwood*), or if the Board finds that there has been a breach of the duty of good faith representation by the union. (See *Sunnybrook and Collingwood*. However, see also *Imperial Tobacco* at p. 440 for a discussion of the possibility of the Board deferring to arbitration even in the face of a section 60 finding that a union has not fairly represented the grievor). The Board's basic position of which the above are exemplifications was summarized in *Imperial Tobacco* at p. 436 as follows:

"... the [arbitration] process must be clearly unavailable or unsuitable to resolving the issue before the Board will refrain from deferring to it."

8. Accordingly, if in the instant case the complainant had not withdrawn the grievance the Board in this situation would have automatically deferred to arbitration. There was no allegation of collusion or connivance and no reason to suspect that the grievance would not be fairly processed.

9. The question the Board had to meet was whether the withdrawal of the arbitration presented a circumstance exceptional enough to cause the Board to decline to defer. In the absence of evidence to the contrary, the Board assumed that the withdrawal of the grievance was on the consent of the grievor. The assumption is buttressed by the reasons given for the withdrawal; greater efficiency, lower costs and avoidance of an anticipated fatal technicality were all in the grievor's interest. A withdrawal by consent does not present the Board with an exceptional circumstance equivalent to a union refusing to process a grievance, a situation wherein the Board would assume jurisdiction. This is not a situation wherein the grievance process is "unavailable" in the sense intended by the Board in *Imperial Tobacco*. While by their own withdrawal the parties might have made the grievance process unavailable to themselves, it would have been an unavailability brought on by their own volition.

10. Furthermore, the complainant has not exhausted the usefulness of the grievance procedure. In *Imperial Tobacco* the Board states at p. 442,

"... it is fundamental to collective bargaining as we know it, that the parties clearly exhaust the usefulness of the grievance process before approaching the Board."

The complainant cannot be heard to say that by withdrawing its grievance for the reasons given it has exhausted the usefulness of the grievance process. Rather, it has attempted to bypass it. If the Board were to assume jurisdiction whenever one party withdraws a filed arbitration, it would create a path to the Board's process which would greatly undermine the very arbitration process which its legislation imposes on the parties, the very process upon which stable collective bargaining relies. In avoidance of such an undesirable result, therefore, the complaint was dismissed.

0710-76-U Arthur G. McKee and Company Canada Limited, (Applicant), v. R. Armstrong, et al (See Schedule "A" attached hereto), (Respondents).

Consent to Prosecute – S90 – Effect of a previous finding that the respondents activities were unlawful – Whether the exercise of the Boards discretion to grant consent will further industrial peace – Effect of not seeking prosecution of some offenders – Effect of further illegal activity being unlikely.

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members J.E.C. Robinson, Q.C. and H. Simon.

APPEARANCES: *David I. Wakely, L. Guest, Alex D. Lundy and R. Toombs for the applicant; Pamela Sigurdson, J. White and B. Docherty for the respondents.*

DECISION OF PAMELA C. PICHER, VICE-CHAIRMAN AND BOARD MEMBER H. SIMON: October 21, 1976

1. This is an application for a consent to prosecute the respondents for their alleged violation of section 63(1) of The Labour Relations Act.
2. On July 15, 1976, in response to the same incident which has given rise to this application, this Board issued a cease and desist order to the respondents named in the instant application. The following excerpt from that decision (Board File No. 0659-76-U) will serve to set out the material facts and the finding based thereon:

"The applicant is the principal contractor presently engaged in the construction of an oil refinery for Texaco Ltd. at Nanticoke in the Regional Municipality of Haldimand-Norfolk, Ontario.

The facts giving rise to this application are not in dispute. On Monday, July 5, 1976 the eighteen respondents who are employees of the applicant and members of The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (hereinafter referred to as Boilermakers), Local 128, each walked off their jobs at Nanticoke between 10:30 and 11:30 a.m. without authorization from the applicant. On Tuesday the respondents refused to report for work. While there is some dispute over whether the respondents were willing to return to work Wednesday afternoon, it is clear that they were back to work Thursday morning, July 8th, two and one half days after they walked off. It was further agreed that the applicant and respondents, as members of the Boilermakers, are parties to a collective agreement the term of which commenced July 1, 1975 and expires June 30, 1977.

After a careful review of the evidence presented at the hearing the Board finds that the walkout constituted a strike under s. 1(1)(m) of the Act in that it amounted to a refusal to work and continue to work in combination or in concert or in accordance with a common understanding, and that it was an illegal strike pursuant to s. 63(1) of the Act in that it took place during the term of the collective agreement.

Although the Board is normally reluctant to issue a direction under s. 123(1) when an illegal strike has ended, it finds that a direction is appropriate in this case in view of the pattern of past unlawful strikes and in view of a reasonable apprehension of future unlawful conduct. (See *North Simcoe Electrical Contracting Ltd.* [1973] OLRN Rep. June 336; *Acoustical Association of Ontario* [1975] OLRB Rep. July 539; *Pilkington Brothers (Canada) Limited, Pilkington Glass Manufacturing Division* [1976] OLRB Rep. Jan. 988; *Acme Building and Construction Limited* [1975] OLRB Rep. Nov. 810). A jurisdictional dispute involving a subcontractor precipitated the walkout of July 5th. The dispute has not been resolved but rather suspended pending a ruling of an impartial jurisdictional dispute board. The Board finds from the evidence presented to it that there is a reasonable likelihood of a future walkout by the respondents depending on the outcome of this and other jurisdictional disagreements. The reasonableness of the fear of future illegal work stoppages is reinforced by the past pattern of unlawful walkouts by the Boilermaker employees of the applicant. There have been seven in the past eighteen months."

3. At the inception of this hearing the parties agreed to the following facts:
 - (1) Arthur G. McKee and Company of Canada Limited (hereinafter referred to as McKee) did not proceed either in its section 123 application or in the instant application against
 - (a) Mr. Kelly, an employee
 - (b) three foremen
 - (c) one steward
 - (d) four students
 but did proceed against all of its other employees who are members of the Boilermakers, Local 128.
 - (2) The strike of July 5, 6 and 7, 1976 was caused by a jurisdictional dispute.
 - (3) The work then in issue has since been assigned to the Boilermakers by the subcontractor.
 - (4) There was no violence in the strike of July 5, 6, and 7.
 - (5) Between the time of the Board's decision on the section 123 application and the hearing of the instant application, McKee has made one work assignment. The assignment was made to the Ironworkers. Although the Boilermakers did not agree with the assignment they resolved the problem without engaging in an unlawful strike.

(6) All job assignments made by any subcontractor on the Texaco project must be made at and through a pre-job conference at the Hamilton Building Trades Council pursuant to the contract between McKee and each subcontractor. If a jurisdictional dispute arises between the subcontractor and a craft, McKee doesn't actively involve itself in the dispute unless and until there is a walkout.

4. Relying on the findings in the above quoted decision and with this agreement of facts, counsel for the parties proceeded directly into argument.

5. Section 90 of the Ontario Labour Relations Act requires that the Board give its consent in writing before a party may institute a prosecution for an offence under the Act.

6. A prerequisite to the Board's granting a consent to prosecute is that the applicant make out a *prima facie* case or raise an arguable point of law. (See *Dillon v. Brown and Lewis*, [1976] OLRB Rep. Feb. 4 at p. 5; *Toronto Western Hospital*, [1972] OLRB Rep. Oct. 851 at p. 853; *A.L. Watson Limited*, [1965] OLRB Rep. Sept. 436 at p. 437; *Hydro-Electric Power Commission of Ontario*, [1964] OLRB Rep. April 39 at p. 40). By virtue of the Board's decision under section 123 of the Act wherein the Board declared the instant strike to be illegal and issued a cease and desist order, the unlawfulness of the respondents' actions is *res judicata* and a *prima facie* case is automatically established. (See *Canadian Elevator Manufacturers*, [1975] OLRB Rep. Sept. 722 at p. 723).

7. Since granting consent to prosecute under section 90 is a matter within the Board's discretion (see *Toronto Western Hospital*, [1972] OLRB Rep. Oct. 851), once the Board is satisfied that a *prima facie* case has been established it must then go on to decide whether or not it should exercise its discretion. Several of the Board's cases focus on the elements which the Board should consider in deciding whether or not to exercise its discretion.

8. In *The Hydro-Electric Power Commission of Ontario*, [1972] OLRB Rep. June 575 at p. 576, the Board made the following statement which negatives the assertion that in the face of a *prima facie* case the Board's consent is virtually automatic:

"The Board's sole function in applications for consent to institute a prosecution is to determine whether, by granting its consent, it will advance the purpose and intent of the Act and thereby promote a sound relationship between the parties."

This same point was earlier enunciated by the Board in *Savage Shoes Limited*, (1953) 53 CLLC para. 17,060 at p. 1459 wherein it was added that, "Prosecution under The Labour Relations Act should not be a manifestation of retributive justice." The Board expanded on these general principles in *Toronto Western Hospital*, [1972] OLRB Rep. Oct. at pp. 852-853:

"An application for consent to institute prosecution therefore comes before the Board primarily for the purpose of allowing the Board to review the circumstances surrounding the allegations and to weigh the matter from an industrial relations point of view. This is in order to allow the Board to determine from its special viewpoint, the value, if any, that might accrue to the parties specifically as well as to the public generally in the area of industrial

relations by permitting the dispute in question to be determined on the purely legal basis of the guilt or innocence of an accused in a quasi-criminal trial.”

Further along in the decision at p. 955 the Board continued:

“As already indicated, a fundamental task for the Board in the exercise of its discretion in applications for consent to prosecute, involves the selection of the course that is best suited, in its opinion, to preserve or advance industrial peace, tranquility and order in the circumstances immediately before it and in industrial society at large. This is surely the logical explanation as to why the legislation requires the fiat of the Board in these applications.”

9. More recently in *Canadian Elevator Manufacturers*, [1975] OLRB Rep. Sept. 722 at p. 727-728, the Board drew the following conclusion after reviewing the case law:

“... the role of the Board under section 90 goes well beyond the determination of a *prima facie* case or the vexatiousness of an application. Section 90 provides an industrial relations perspective to what would otherwise be an ordinary criminal matter – a matter emphasizing the rule of law. In other words, the Legislature has recognized that the resolution of labour relations problems often requires something more sophisticated than the punitive enforcement of statutory provisions. As those in the field appreciate successful labour relations embrace delicate social relationships. The same reality therefore requires flexibility in the administration and enforcement of labour laws.”

10. These statements clearly establish that a *prima facie* case is not sufficient for the granting of a consent to prosecute; the Board must further be satisfied that in opening the door to the punitive enforcement of the statutory provisions of the Act, it is at the same time furthering the labour relations interest of the parties specifically, as well as the public generally; i.e. it must be satisfied that it is “advancing industrial peace, tranquility and order in the circumstances immediately before it and in industrial society at large.”

11. The Board has declined to exercise its discretion to grant consent to prosecute even in the face of a *prima facie* case in a variety of circumstances, some of which are particularly pertinent to the situation before this Board.

12. In *Hadley-Moultrop Engineering Co. Ltd.* (1954), 54 CLLC para. 17,072, the Board dismissed the application for consent to prosecute the respondents for engaging in an illegal strike where the applications were filed in respect of only about 50% of the employees who were picked at random. The Board dismissed the application on the ground that allowing preferential treatment in the prosecutions would not further good labour relations. Speaking for the majority, Mr. J. Finkelman stated at p. 1478:

“... we believe, in the interest of the development of a sound industrial relations policy in this province, that it is unwise to permit the legislation to be used in such a fashion as to lead to some of the employees receiving preferential treatment in the matter of prosecution for an infringement of the Act.”

13. *Canadian Elevators Manufacturers, supra*, was a complicated case of restricted general applicability. Certain aspects of the case, however, do provide guidance because of some paralleling facts. In that case, as in the case before the Board, the application was for a consent to prosecute the respondents for engaging in an illegal strike in respect of which a cease and desist order had already been issued. The Board dismissed the application on three grounds: *Firstly*, the Board found that the prosecution would not solve the "very difficult and complex labour problem that could most appropriately be resolved by way of grievance arbitration or by mutual accommodation and compromise." In other words the Board found that prosecution was the wrong avenue for solving the parties' labour problem. *Secondly*, and of particular relevance to this case at hand, the Board declined to grant consent as the applicant had not established that the cease and desist order was not sufficient. Speaking for the majority, Mr. George Adams stated at p. 732:

"Furthermore, the applicant has already obtained a declaration and a cease and desist order in respect to the respondent trade union's actions and the applicant did not establish that these remedies have proven inadequate."

Thirdly, the application was dismissed because it sought to prosecute on a discriminatory basis. Mr. Adams stated:

"The applicant indicated that its failure to proceed against all of the permit men was premised on the apparent adequacy of the Board's earlier cease and desist order but we would note that Wayne Clough is subject to that order and named in the instant application as well. More importantly no explanation was given for the applicant's failure to proceed against the union members who refused to work with the permit men. The Board is on record that it will not consent to the institution of a prosecution on a discriminatory basis."

14. In the *Toronto Western Hospital* case, *supra*, Board denied its consent on the ground that the prosecution would serve no useful purpose, i.e. it would not help to restore a proper relationship between the parties or encourage orderly collective bargaining. Instead the Board was of the opinion that "to grant consent would only be to provide another rostrum and another arena for the prolongation of the whole dispute."

15. In *Canal Cartage Limited*, [1961] OLRB Rep. Oct. 251 the Board declined to grant consent to prosecute the ringleaders of an unlawful strike for the following reasons:

"The Board is of the opinion, however, in view of the special circumstances of this case, including the short duration of the strike, the lack of a history of such occurrences, the absence of violence and the fact that the respondents have been discharged that no useful purpose would be served in the granting of its consent to institute a prosecution against the respondents."

16. Applying the general principles used for determining whether the Board should exercise its discretion and grant consent to prosecute and relying on the above noted specific applications of these principles to particular fact situations, the Board in this instance finds that for the following reasons it must decline to exercise its discretion to grant the applicant consent to prosecute the respondents.

17. As indicated in the agreed statement of facts, the applicant did not proceed against nine Boilermaker employees who engaged in the unlawful strike: four students, one steward, three foremen and one regular employee. The applicant justified these exclusions on the following grounds: *firstly*, the students are only summer employees and don't exercise independent judgement, i.e. when the other employees go off they have no choice but to follow; *secondly*, the union and international acted responsibly in the unlawful strike and thus it would not further labour relations to proceed against the union steward; *thirdly*, the foremen are leaders upon whom the company relies heavily to get work done, and thus it would be unwise to go against them if the company later wants their assistance. *Fourthly*, the company acknowledged that the failure to proceed against the one employee was inadvertent.

18. While students may be somewhat reluctant not to take part in a mass walkout, nothing prevents them from abiding by the law. It is hard to appreciate how students should be distinguished from normal employees with weak personalities. Surely whether one takes part in a walkout against one's will depends more on one's personality than one's status as a student.

19. The union steward tried without success to get the employees to return to work. Because of these efforts to enforce the law it is quite proper for the applicant to decline to proceed against the steward.

20. The three foremen on the other hand assumed what appears to be a leading role in the strike. Because the foremen are recognized as leaders they bear a greater responsibility to uphold the law. Whether or not the company believes that their decision not to proceed against the foremen will insure future co-operation from them, this rationale does not in the Board's eye justify the resulting discrimination and preferential treatment.

21. Although the failure to proceed against one employee may have been inadvertent, it as well does not diminish the resulting discrimination.

22. If the Board were to grant its consent to prosecute the respondents in the face of the company's failure to proceed against 4 students, 3 foremen and 1 employee, it would be allowing the legislation to be used in a manner which would result in some employees receiving preferential treatment, something which was clearly condemned in *Hadley-Moultrop Engineering Co. Ltd.*, *supra*, and more recently in *Canadian Elevator Manufacturers*, *supra*. In granting the consent to prosecute the Board must be satisfied that it is promoting industrial peace. If the Board were to grant its consent to prosecute the employees who were followers in the absence of their foremen who were leaders, as well as in the absence of one of their fellow employees and four students, understandable resentment and hostility would be a more likely result than "peace, tranquility and order."

23. The second reason for which the Board is denying its consent to prosecute is that in the face of both a declaration that the strike was illegal and a cease and desist order against the respondents, it can discern no useful labour relations purpose which will be served by granting its consent. (See specifically *Canadian Elevators Manufacturers*, *supra*, and more generally *Toronto Western Hospital*, *supra*). Not only has the order not been violated but the respondents have recently demonstrated an ability to properly deal with a jurisdictional dispute which was the cause of the strike in question. The likelihood of another

illegal strike is further minimized by the fact that the respondents are subject to a fine and/or imprisonment if the cease and desist order is violated. (See *Pilkington Brothers (Canada) Limited*, [1976] OLRB Rep. Jan. 988). In view of the above factors it is difficult to discern what the prosecution would accomplish beyond prolonging disharmony between the parties and punishing the respondents for their illegal actions. Punishment for the sake of punishment will not in the circumstances of this case further harmonious industrial relations between the parties; instead it will exacerbate problems between the parties that may presently be on the road to resolution. As was pointed out in *Savage Shoes Limited*, *supra*, retributive justice is not in itself a proper ground for the granting of a consent to prosecute. There are many occasions, of which this is one, where a second chance rather than punishment provides the best on going remedy.

24. The Board therefore has denied its consent for the applicant to prosecute the respondents because to do so would not further sound labour relations between the parties for two reasons: firstly, that the consent would result in some employees receiving preferential treatment which would intensify discord rather than resolve it, and secondly, because the applicant has not shown the declaration and cease and desist order to be an inadequate remedy; the Board is not willing to provide its consent solely for providing retributive justice.

DECISION OF BOARD MEMBER J.E.C. ROBINSON, Q.C.

I dissent from the decision of the majority. My reasons therefor will be given at a later date.

0956-76-R Amalagamated Clothing and Textile Workers Union,
(Applicant), v. **James B. McGregor-Division of Toby Industries Limited**,
(Respondent).

Trade Union – Merger – Whether the Board will treat a failure to ratify the new constitution of a trade union resulting from the merger of two unions as seriously as if it was a new union.

BEFORE: M.G. Picher, Vice-Chairman, and Board Members H. Simon and J.D. Bell.

APPEARANCES: *Harold F. Caley, George Watson, Martin L. Levinson, Frank Aquino and Jack Matvais for the applicant; R.A. Werry and A. Pearson for the respondent.*

DECISION OF THE BOARD: October 21, 1976

2. This is an application for certification.

3. This being the first such application made before the Board by the applicant organization, it was notified by the Registrar that it must be prepared at the hearing to satisfy the Board that it is a trade union within the meaning of section 1(1) (n) of the Act.

4. The applicant organization is the product of a merger of the Amalgamated Clothing Workers of America and the Textile Workers Union of America, which took place in June, 1976. It is not disputed that both of these unions have for some years enjoyed the status of a trade union within section 1(1) (n) of The (Labour Relations Act before this Board.

5. Two witnesses were called on behalf of the applicant: Mr. Arthur M. Goldberg, General Counsel of the Amalgamated Clothing Workers of America at the time of the merger, and Mr. George Watson who was the Canadian Director of the Textile Workers Union of America at the time of the merger. Their testimony established that a merger agreement was signed and ratified by the appropriate executive officers of both unions and that on June 1 and 2, 1976 both unions held simultaneous conventions in Washington, D.C. At those meetings the delegates representing the membership of the unions voted to ratify the Memorandum of Agreement and to approve the constitution of the then proposed applicant organization. The delegates had prior notice of both documents and voted their approval of them.

6 During the next two days, June 3 and 4, 1976, the merged unions met for the first time together as the applicant organization. During that meeting the officers of the newly formed organization, who had been predetermined in the Memorandum of Agreement, assumed their offices. From that time to this it appears that the applicant organization has been discharging its functions pursuant to its constitution.

7. At the hearing the Board expressed its concern because it did not appear that the constitution of the applicant organization was ratified by its members at its first convention, namely the meeting of June 3 and 4, 1976 or at any time since. Both witnesses seemed to believe that the ratification votes taken earlier within the constituent unions would be sufficient ratification by the members and that all actions subsequent, including the assumption of office of the executive of the applicant organization at the meeting of June 3 and 4, 1976, and the transacting of its business since that time have been consistent with that view.

8. Upon an inquiry into the status of an entirely new or grass roots organization that purports to be a union, this Board examines with some exactitude the constitution of the organization and the procedures by which the constitution was adopted. As was stated by this Board in *J. Harris & Sons Ltd.* "... the constitution of the applicant is the source and limit of its existence ...". The Board's concern for the constitution and the regularity of its adoption in that circumstance is not borne of devotion to mere technicality, but out of the Board's fundamental concern that the applicant be a viable entity to carry out the purposes described in section 1(1) (n) of The Labour Relations Act. If a constitution were not properly adopted or, if properly adopted, not properly adhered to, questions might arise as to whether those who purported to be its officers duly appointed or elected under the constitution were indeed its officers at all, and if not, whether it could be considered a viable entity for carrying out the purposes described in the Act. Needless to say, those concerns must always be satisfied when the Board inquires into the status of an applicant organization, including an organization that is the child of two established unions. A serious defect in the adoption of the constitution of an organization that is the product of two unions with section 1(1) (n) status or some serious defect in the election or appointment of its officers might cause the Board conclusive doubt as to its ability to function for the purposes of that section.

9. The Board is satisfied that that is not so in the instant case. Here the membership of both constituent unions voted to ratify both the Memorandum of Agreement between them and the constitution of the applicant organization. That they did so at the last meeting of the parent unions and one or two days prior to the first meeting of the applicant organization is at most a flaw in form and not a defect in substance such as to call into question the status of the applicant. This is especially so when the meetings of June 1 and 2, 3 and 4, 1976 are viewed as a single continuum with a single purpose. In our view the acts prior to, during and following these meetings are inextricably related. What in fact occurred is a blending of the constitutions and officers of the merged unions into a single union with a single constitution and a single set of officers. The sequence of steps by which that was achieved might have taken a number of forms, some perhaps more orthodox than the sequence adopted. In substance, however, it would have added little to require the delegates to vote at the meeting of the 3rd and 4th of June to approve a constitution upon which they had favourably voted at the meetings of the 1st and 2nd of June.

10. The Board finds that the applicant is a trade union within the meaning of section 1(1) (n) of The Labour Relations Act.

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1223-75-R International Brotherhood of Painters and Allied Trades Local Union 1891, (Applicant) v. **Toronto Drywall Services**, (Respondent), Group of Employees, (Objectors).

Employee – Whether employee or independent contractor – Whether Board will apply four-fold test or look primarily to control.

BEFORE: R.A. Furness, Vice-Chairman, and Board Members H.J.F. Ade and E. Boyer.

APPEARANCES AT THE HEARING: *Maxwell Gotlieb appearing for the applicant; J.C. Carson, Q.C. and Alfonso Direzze appearing for the respondent; no one appearing for the objectors.*

DECISION OF THE BOARD: October 12, 1976

3. The applicant is seeking certification with respect to a bargaining unit of painters and painters' apprentices in the employ of the respondent in the Board's geographic area #8 with a clarity note to include drywall tapers. The respondent takes the view that the persons who are alleged by the applicant to be employees of the respondent are in fact independent contractors and therefore outside the scope of The Labour Relations Act. This application was filed prior to the enactment of section 1(1) (ga) section had no application to this proceeding.

4. The evidence in the Report of the Labour Relations Officer was given by Antonio D'Agostino, Antonio Palombo, Celeste Antonio Veta and Danny Ciabbatti. These persons

did not enter into any formal written contracts with the respondent prior to the commencement of their relationships. The respondent does have a standard document which is entitled "Drywall Contract". This "Drywall Contract" recites as follows:

BETWEEN TORONTO DRYWALL SERVICES andhereinafter called the Sub-Contractor, wherein the Sub-Contractor does covenant and agree to perform the work specified herein-under including the supplying of necessary materials to carry out the work in a manner satisfactory to Toronto Drywall Services for an agreed price to be paid on completion of job.

A space is provided for the signature of the sub-contractor and the respondent. Provision is made for inserting various information in the "Drywall Contract", such as, lot, builder, type of work, amount of feet, cost per one thousand square feet and total. Based upon this information it appears that a figure entitled "TOTAL LABOUR" may be computed. Various items such as material charge, service charge, and others are styled as deductions and are apparently deducted from "TOTAL LABOUR" to arrive at a figure for "NET TOTAL". At the end of the "Drywall Contract" there is space for a signature and a date.

5. The evidence establishes that these "Drywall Contracts" are not entered into prior to the commencement of any definable portion of work. In fact these "Drywall Contracts" are completed by the respondent after certain work has been completed by the person concerned and who in turn verifies the figures and calculations and signs the "Drywall Contract". This process occurs every week and forms the basis on which the respondent makes payment to each of these four persons. In our view this "Drywall Contract" is in itself merely a method of computing payments and is in no sense a contract. For example, Danny Ciabbatti gave evidence that on one occasion he signed ten to fifteen "Drywall Contracts" to cover work which he had performed for the respondent during the last three months.

6. The method of fixing the rate to be paid per square foot of completed work is also worthy of comment. There is some discussion between the respondent and these four persons on the rate. Celeste Antonio Veta gave evidence that he deals with the respondent in this way:

"Well, [the respondent] says you know, I could pay you this much right. Now, if you want to do it, okay, otherwise, go look around and find somebody else that pays you more."

Antonio D'Agostini gave evidence that he does not always discuss the price to be paid for a job but that when it comes to going out of town he pretty well tells the respondent what he wants in order to go. Antonio Palombo, on the other hand, gave evidence that he discussed pay with the respondent when he started and was told that he would be piece work and would be paid so much per square foot.

7. The method of fixing the rate for the job appears to vary from person to person and may merely reflect the personalities of the person who is involved. There appears to be little actual bargaining in fixing the rate. However, the absence or presence of bargaining is not indicative of the relationship of employer/employee or that of two contracting parties.

which are dealing at arm's length. An employee who is not covered by a collective agreement may, no less than an independent contractor, bargain with his employer over his rate of remuneration.

8. The Board finds that these four persons and the respondent do not enter into written contracts prior to undertaking the work which they perform and while there may on occasions be some bargaining or negotiating between these persons and the respondent with respect to the rate, such conduct does not necessarily have reference to the creation of an oral contract between the respondent and an independent contractor.

9. The respondent exercises a measure of control over these four persons. While they determine their own hours of work, the respondent has the power to move them from job to job. While some of these four persons have on occasions performed work for other companies which are engaged in the business of drywall, they, in effect, clear with the respondent the dates and periods when they may absent themselves. However, Antonio D'Agostini testifies that he is sometimes in a position to say that he will work somewhere else for two to three weeks but that if he is replaced he would not get his job back. The "Drywall Contract" does not provide for any limitations of time for completing the "contract" and the evidence in the Report suggests that the respondent requires continuous and uninterrupted production from these four persons. It appears to the Board that if one of these four persons wishes to interrupt his working relationship with the respondent he risks the complete termination of that relationship. This factor in the circumstances of this application suggests the relationship of an employer/employee rather than that of two contracting parties. The respondent exercises control over these four persons since it has retained to itself the power to require them to correct any unsatisfactory work at their own expense. There is no evidence of any limitation on this power which the respondent exercises.

10. These persons own their own tools. However, these tools are minor in nature and consist of a trowel, hook, knife, hammer, mixer and a drill. They each rent a machine to perform certain aspects of their work. Each has a truck and bears the total cost of owning and operating this truck. Antonio D'Agostini owns a truck and does not own a car. These four persons use their trucks as transportation to and from work. There is no evidence to suggest that they use their trucks to perform their work for the respondent. The Board finds that the trucks are not a tool used either as a necessary part of their work or as a tool of the trade.

11. The respondent supplies and delivers to the job-sites the materials which these four persons require to perform their work. The respondent deducts the cost of the material which has been used from the amount which is to be paid each week to each of the under the hearing of "material charge". Danny Ciabbatti gave evidence that there is also four per cent service charge on his pay and that he did not know what it meant. While these four persons may purchase their material from a source other than the respondent they do, as a matter of convenience, receive their material from the respondent. The respondent does not make any deductions from the amounts paid to them with respect to income tax, unemployment insurance, hospitalization insurance or Canada pension plan. The respondent does make a deduction with respect to Workman's Compensation. These four persons make their own arrangements with respect to some of these items other than payments respecting Workman's Compensation.

12. In determining whether a person is either an employee in the context of The Labour Relations Act or an independent contractor, the Board has since its decision in the *Canada Bread Company Limited* case 62 CLLC ¶16,223, adopted the test suggested by Lord Wright in *Montreal v. Montreal Locomotive Works Limited* [1947] 1 D.L.R. 161,169. In that case his Lordship stated:

In earlier cases a single test, such as the presence or absence of control, was often relied on to determine whether the case was one of master and servant, mostly in order to decide issues of tortious liability on the part of the master or superior. *In the more complex conditions of modern industry, more complicated tests have often to be applied.* It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss. (emphasis supplied)

13. There is little supervision by the respondent. However, these four persons are not to an insignificant degree controlled by the respondent. The respondent tells them where to work and they find it necessary despite the presence of any fetters in the "Drywall Contract" to seek the respondent's approval before performing work for another party.

14. These four persons own and provide their own tools. There is no evidence on the cost of the machines which they rent. The tools which they own appear to be usual tools which a drywall tapper would own regardless of whether he is an employee or an independent contractor. In these circumstances, the ownership of tools by these four persons is of little significance in determining whether they are independent contractors.

15. These four persons receive a payment from the respondent each week in the form of a cheque. The amount of the cheque depends upon the volume of work which each has satisfactorily completed. It appears to the Board that this amount is more appropriately to be considered as wages based upon an incentive work scheme as opposed to an hourly rate for the job. Such amounts are not "profits" in the commercial sense of the word. See the *Mo-Mek Systems Ltd.* case OLRB Rep. 1974 Oct. p. 642 and the *Mr. Seamless Eavestroughing Thunder Bay Limited* case OLRB Rep. 1974 Dec. 875. If "profits" are to be regarded as the excess of revenues over expenses; the fact that with the exception of payments with respect to Workman's Compensation, these four persons make their own arrangements regarding payments under certain federal statutes, does elevate the payments which they receive from the respondent to the status of "profits". The possibility that certain federal statutes may have been contravened under the scheme which the respondent has endeavoured to establish does not destroy the relationship of employer/employee which may be found to exist under The Labour Relations Act. In this regard reference may be had to *Mo-Mek Systems Ltd.* case, *supra*, the *Bermac Burner Service* case, OLRB Rep. 1969 Oct. p. 850, the *Dearie & Warren Limited* case OLRB Rep. 1970 Nov. p. 816 and to the *Mr. Seamless Eavestroughing Thunder Bay Limited* case, *supra*.

16. These four persons clearly have no risk of loss in their relationship with the respondent. They pay for the material which they use and it appears from the Report that they merely receive sufficient material for their immediate requirements.

17. In applying the fourfold test it is only in the field of control that any arguable case may be made out in support of a finding that these four persons are independent contractors. However, in our view, even this test of control falls short of a finding that the respondent does not effectively control them. In the *Cima Limited* case, OLRB Rep. 1963, May p. 100, the Board stated that each of these four tests must be satisfied in order for a finding to be made that certain persons in dispute are independent contractors. In the instant application, the Board need not go that far because none of these four tests compel the Board to conclude that these four persons are not employees of the respondent rather than independent contractors.

18. Counsel for the respondent was critical of the fourfold test which suggested by Lord Wright in the decision of the Privy Council in *Montreal v. Locomotive Works Limited*, *supra*. To counsel's way of thinking the most appropriate test was to place most importance on the question of control. In addition, he pointed out Lord Wright's observations were made in a case which involved a determination of whether a corporation was an independent contractor or an agent of the Crown for the purpose of assessing business taxes and should not therefore be applied uncritically in the instant application. The fourfold test has been generally applied by the Board for almost twenty-five years and during this time the Board has not been persuaded that there is a superior test. The Board refers to the remarks of Lord Wright regarding the context in which the single test of control evolved in the realm of tortious liability. Counsel cited a series of cases wherein the fourfold test was not applied.

19. Counsel for the respondent relied heavily on the case of *Performing Rights Society, Limited v. Mitchell and Booker (Palais De Danse) Limited* [1924] 1 K.B. 762, the court was concerned with determining whether a band or the owners of a dance hall were responsible for damages arising from infringement of copyright. This involved a consideration of whether the band was to be regarded as an independent contractor or as a servant of the owners of the dance hall. At page 767, McCardi, J. stated:

"It seems, however, reasonably clear that the final test, if there be a final test, and certainly the test to be generally applied, lies in the nature and degree of detailed control over the person alleged to be a servant. *This circumstance is, of course, one only of several to be considered, but it is usually of vital importance.*" (emphasis added)

20. In our view McCardie, J. recognized the inherent difficulties in the single test of control and, as Lord Wright subsequently pointed out, in the more complex conditions of modern industry, more complicated tests have often to be applied. In the instant case the Board is not being asked to determine liability for infringement of copyright, or whether certain expenses may be deducted in computing taxable income *Fainstein v. M.N.R.* (1952) 52 D.T.C. 102) or whether a certain docker was under a contract of service *Short v. J. and W. Henderson, Limited* (1946) 174 L.T. 417, but rather in the context of labour relations certain persons are employees for the purpose of The Labour Relations Act. In our view the more sophisticated fourfold test which Lord Wright suggested is a more probative and realistic approach than the heavy reliance on control which counsel for the respondent has advocated.

21. The Board further finds that all painters and painters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the

County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foreman and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

22. For the purposes of clarity, the Board declares that drywall tapers are included in the bargaining unit.

23. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on November 20, 1975, the terminal date fixed for this application and the date which the Board determines, under section 92(2) (j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

24. A certificate will issue to the applicant.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING SEPTEMBER 1976

Applications for Certification

BARGAINING AGENTS CERTIFIED DURING SEPTEMBER

No Vote Conducted

1369-75-R: Retail Clerks Union, Local 486 (Applicant) v. Andre St-Denis carrying on business under the firm name and style of "Rockland IGA" (RESPONDENT).

Unit #1: "all employees of the respondent employed at its store located in rockland, Ontario save and except general manager, persons above the rank of general manager, persons employed for not more than twenty-four hours per week and students employed during the school vacation period." (10 employees in the unit) *Having regard to the agreement of the parties*.

Unit #2: "all employees of the respondent regularly employed for not more than twenty four hours per week and students employed during the school vacation at its store in Rockland, Ontario save and except general manager and persons above the rank of general manager." (7 employees in the unit).

1765-75-R: Ontario Nurses' Association (Applicant) v. Groves Memorial Community Hospital (Respondent) v. Group of Employees (Objectors).

Unit #1: "all registered and graduate nurses employed by the respondent at Fergus, Ontario, in a nursing capacity save and except head nurses and persons above the rank of head nurse, persons regularly employed for 24 hours per week or less and students employed during the school vacation pe"(28 employees in the unit).

Unit #2: "all registered and graduate nurses regularly employed by the respondent at Fergus, Ontario, in a nursing capacity for not more than 24 hours per week and student nurses employed in a nursing capacity during the school vacation period save and except head nurses and persons above the rank of head nurse." (3 employees in the unit).

1852-75-R: Canadian Chemical Workers Union (Applicant) v. Shamrock Chemicals Limited (Responde).

Unit: "all employees of the respondent at London save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (10 employees in the unit).

0071-76-R: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Kronos Electric Co. Limited (Respondent).

Unit: "all electricians and electricians' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and

the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." employees in the unit).

0257-76-R: Canadian Union of Public Employees (Applicant) v. Greater Windsor Investments Limited, Windsor Nursing Home (Respondent).

Unit: "all employees of the respondent at its Windsor Nursing Home in the City of Windsor save and except administrator, dietary supervisor, nursing director, social director and persons above those ranks, and registered nurses and persons regularly employed for not more than 24 hours per week." (35 employees in the unit). (*Having regard to the above*).

0337-76-R: Local Union 38 United Brotherhood of Carpenters and Joiners of America (Applicant) v. The Prospect Hotel (Niagara Falls 1971) Limited (Respondent).

"all carpenters and carpenter apprentices in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand as it existed on the 31st day of March, 1974, save and except non-working foreman and maintenance carpenters employed in maintenance work." (1 employee in the unit). (*Having regard to the agreement of the parties*).

0662-76-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Dad's Cookies Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in the Borough of Scarborough in the Municipality of Metropolitan Toronto save and except foremen and foreladies, persons above the rank of foremen and foreladies, office, sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (41 employees in the unit). (*Having regard to the agreement of the parties*).

0778-76-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. Scorpio Engineering (St. Catharines) Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the District of Kenora, including the Patricia Portion, save and except non-working foremen and persons above the rank of non-working foreman." (16 employees in the unit).

0783-76-R: Retail Clerks Union, Local 409 (Applicant) v. Nottes Supermarket Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Dryden, Ontario, save and except Assistant Store Manager and persons above the rank of Assistant Store Manager and office staff." (32 employees in the unit). (*Having regard to the agreement of the parties*).

0826-76-R: Canadian Brotherhood of Railway, Transport and General Workers (Applicant) v. CN Tower Restaurants Ltd. (A Division of CN Hotels) (Respondent) v. Hotel and Club Employees Union, Local 299 (Intervener).

Unit: "all employees of the respondent at the CN Tower Restaurants in the Municipality of Metropolitan Toronto save and except managers, department heads, office, sales, accounting staff, supervisors, students employed for not more than 24 hours per week." (269 employees in the unit). (*Having regard to the agreement of the parties*).

0847-76-R: Ontario Nurses' Association (Applicant) v. St. Andrews Hospital (Respondent) v. Group of Employees (Objectors).

Unit: "all parties to this matter having agreed that all registered and graduate nurses engaged in a nursing capacity employed by St. Andrews Hospital, Midland, save and except administrative supervisors and persons above the rank of administrative supervisor." (no employees in the unit). (*Having regard to the agreement of the parties*).

0848-76-R: Sudbury, Mine, Mill and Smelter Workers Union, Local 598 (Applicant) v. Sudbury Metals Company (Respondent) v. United Steelworkers of America (Intervener).

Unit: "all employees of the respondent at its plant operation situated in Falconbridge, Ontario, save and except foremen, persons above the rank of foreman, office and clerical staff." (38 employees in the unit). (*Having regard to the agreement of the parties*).

0875-76-R: International Molders & Allied Workers Union (Applicant) v. Union Electric Supply Co. Limited (Respondent).

Unit: "all office and clerical employees of the respondent at St. Catharines, save and except supervisors, persons above the rank of supervisor, branch manager and commissioned salesmen." (2 employees in the unit).

0888-76-R: Retail, Wholesale & Department Store Union AFL-CLC (Applicant) v. M. Loeb, Limited (Respondent).

Unit: "all employees of the respondent at Sudbury, regularly employed for not more than 24 hours per week and students employed during the school vacation period." (17 employees in the unit).

0902-76-R: United Steelworkers of America (Applicant) v. Indalloy – Division of Indal Limited (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period." (45 employees in the unit).

0913-76-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Applicant) v. Libby, McNeill & Libby of Canada, Limited (Respondent).

Unit: "all office and clerical employees of the respondent at No. 1 Libby Street, Wallaceburg, Ontario, save and except assistant department heads, persons above the rank of assistant department head, persons employed in the employment department, confidential secretaries to management and persons covered by the collective agreement between the respondent and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW); Local 251." (13 employees in the unit). (*Having regard to the agreement of the parties*).

0915-76-R: Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Coreydale Contracting Company (Respondent).

Unit: "all truck drivers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Ontario, save and except non-working foreman." (8 employees in the unit).

0917-76-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Grew Corporation (Grew Boat Division) (Respondent).

Unit: "all employees of the respondent in Penetanguishene, save and except foremen, persons above that rank, office and sales staff." (103 employees in the unit).

0926-76-R: International Union of Operating Engineers, Local 793 (Applicant) v. Atlantic Contracting Company Limited (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

0932-76-R: Operative Plasterers and Cement Masons International Association of the United States and Canada Local Union No. 124, Ottawa, Hull (Applicant) v. Zaph Construction Ltd. (Respondent).

Unit: "all cement masons and cement masons' apprentices in the employ of the respondent in the Regional Municipality of Ottawa – Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0933-76-R: Operative Plasterers and Cement Masons International Association of the United States and Canada, Local #124, Ottawa, Ontario (Applicant) v. Roy & Roy Drywall Limited (Respondent).

Unit: "all plasterers and plasterers' apprentices in the employ of the respondent in the Regional Municipality of Ottawa – Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit). (*clarity note – See Report of full decision [1976] OLRB Rep. September.*)

0937-76-R: Local Union 105 International Brotherhood of Electrical Workers (Applicant) v. P & M Electric Company Limited (Respondent) v. Employee (Objector).

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the County of Wentworth, including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

0940-1976-R: Sheet Metal Workers' International Association, Local Union 537 (Applicant) v. Walker Brothers Roofers Limited (Respondent).

Unit: "all employees of the respondent engaged in roofing in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (15 employees in the unit).

0946-76-R: Labourers' International Union of North America, Local 183 (Applicant) v. A C Kahn Janitorial Service (Respondent).

Unit: “all employees of the respondent engaged in cleaning and maintenance at Tuxedo Court Apartments, Scarborough, including resident superintendents, save and except property managers, persons above the rank of property manager, office and clerical staff.” (9 employees in the unit). (*Having regard to the agreement of the parties*).

0951-1976-R: The Canadian Union of Public Employees (Applicant) v. Leamington District Memorial Hospital (Respondent) v. Group of Employees (Objectors).

Unit # 1: “all office and clerical employees of Leamington District Memorial Hospital, Leamington, Ontario, save and except assistant office manager, persons above the rank of assistant office manager, payroll clerk, secretary to the Director of Nursing, and secretary to the administrator, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (13 employees in the unit).

Unit # 2: “all office and clerical employees of Leamington District Memorial Hospital, Leamington, Ontario, employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except assistant office manager, persons above the rank of assistant office manager.” (13 employees in the unit).

0953-76-R: Christian Labour Association of Canada (Applicant) v. Tecumseth Insulation Services Ltd. (Respondent).

Unit: “all insulation mechanics and insulation apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit). (*Having regard to the foregoing*).

0954-76-R: The Canadian Union of Public Employees (Applicant) v. The Regional Municipality of Durham (Respondent) v. Group of Employees (Objectors).

Unit: “all office and clerical employees of the respondent at its Homes for the Aged, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, confidential secretary to the administrator, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (16 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note* – see Report of full decision [1976] OLRB Rep. September).

0964-76-R: United Electrical, Radio and Machine Workers of America (UE) (Applicant) v. Centre Moulded Plastics Limited (Respondent) v. United Steelworkers of America (Intervener).

Unit: “all employees of the respondent in Barrie, save and except foremen and foreladies, persons above the rank of foreman or forelady, office and sales staff, students and persons regularly employed less than 24 hours per week.” (44 employees in the unit). (*Having regard to the agreement of the parties*).

0968-76-R: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Base Electrical Co. Ltd. (Respondent).

Unit: “all electricians and electricians’ apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (24 employees in the unit).

0969-76-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Applicant) v. Mastic Manufacturing Limited (Respondent).

Unit: "all employees of the respondent in London, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (29 employees in the unit). *(Having regard to the agreement of the parties).*

0979-76-R: Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Giuseppe Alfano and Sons Ltd. carrying on business as Ontario Paving (Respondent).

Unit: "all truck drivers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario." (10 employees in the unit).

0982-76-R: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Muenster Construction Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent within a radius of thirty-five miles from the City of Sudbury Federal Building, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

0986-76-R: Labourers' International Union of North America, Local 506 (Applicant) v. Runnymede Development Corporation Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, employed on building projects, except residential building projects, but including labourers employed as helpers of bricklayers and plasterers, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

0987-76-R: Ontario Nurses' Association (Applicant) v. Bestview Holdings Limited (Respondent).

Unit: "all registered and graduate nurses employed by Bestview Holdings Limited at Bestview Nursing Home in the City of Toronto, Ontario in a nursing capacity save and except Director of Nurses and persons above the rank of Director of Nurses." (12 employees in the unit). *(Having regard to the agreement of the parties).*

0989-76-R: Christian Labour Association of Canada (Applicant) v. Central Stampings Limited (Respondent).

Unit: "all office staff of the respondent at Windsor, save and except office manager, persons above the rank of office manager, buyer shipper/receiver, production control expeditor, management trainees, sales staff and students employed during the school vacation period." (5 employees in the unit). *Having regard to the agreement of the parties).*

0997-76-R Laborers' International Union of North America Local Union No. 597 (Applicant) v. Farley & King Const. Co. (Respondent).

Unit: “all construction labourers in the employ of the respondent in the County of Ontario (except the Townships of Pickering, Rama, Mara and Thorah) and the County of Durham (except the Township of Hope), save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

1013-76-R: Local Union 785, of The United Brotherhood of Carpenters and Joiners of America (Applicant) v. Halton Renovations Limited (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the Regional Municipality of Waterloo except part of Beverly Township annexed by North Dumfries Township, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

1014-76-R: Labourers’ International Union of North America, Local 1059 (Applicant) v. Ronark Developments, A Division of Ronyx Corporation Limited (Respondent).

Unit: “all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in the unit). (*Having regard to the foregoing*). (Clarity note – see Report of full decision [1976] OLRB Rep. September).

1019-76-R: International Union of Operating Engineers, Local 793 (Applicant) v. Panza Bros. Construction Ltd. (Respondent).

Unit: “all employees of the respondent working in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, engaged in the operating of cranes, shovels, bulldozers, and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and those above the rank of non-working f(2 employees in the unit).

1024-76-R: United Brotherhood of Carpenters and Joiners of America, Local à Union No. 38 (Applicant) v. D:R: Crawford Construction Limited (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and those above the rank of non-working foreman.” (2 employees in the unit).

1026-76-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Avenue Sewer and Watermain Contractor Limited (Respondent).

Unit: “all construction labourers of the respondent working in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman.” (5 employees in the unit).

1028-76-R: Service Employees Union, Local 478 A.F. of L., C.I.O., C.L.C., (Applicant) v. Cochrane Nursing Homes Limited (Respondent).

Unit: “all employees employed at Cochrane Nursing Home, at North Cochrane Ontario, save and except professional nursing staff, physio-therapists, occupational therapists, supervisors, persons

above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (31 employees in the unit). (*clarity note* – see Report of full decision [1976] OLRB Rep. September).

1034-76-R: International Union of Operating Engineers, Local 793 (Applicant) v. Avenue Sewer & Watermains Ltd. (Respondent).

Unit: “all employees of the respondent working in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

1035-76-R: The Canadian Union of Public Employees (Applicant) v. Cochrane-Iroquois Falls D.R.C.S.S. Board (Respondent) v. Employee (Objector).

Unit: “all employees of the Cochrane-Iroquois Falls D.R.C.S.S. Board at Cochrane and at Iroquois Falls and in the Municipality of Black River-Matheson, Ontario, employed in its maintenance, services and plant operations, save and except supervisor, persons above the rank of supervisor, technical personnel and office staff.” (21 employees in the unit). (*Having regard to the agreement of the parties*).

1049-76-R: Retail Clerks Union, Local 206, chartered by Retail Clerks International Association (Applicant) v. Double Kay Investments Limited carrying on business as The Leonard Hotel and Motor Inn (Respondent) v. Group of Employees (Objectors) v. Hotel and Restaurant Employees’ and Bartenders’ International Union, Local 7456 (Intervenors).

Unit #1: “all employees of the respondent at St. Catharines, Ontario, save and except managers, persons above the rank of manager, head chef, office and clerical employees, persons regularly employed for 24 hours per week or less and students employed during the school vacation period, and persons covered by a subsisting collective agreement with Local 756 of the Hotel and Restaurant Employees and Bartenders International Union.” (17 employees in the unit).

Unit #2: “all employees of the respondent at St. Catharines, Ontario, regularly employed for 24 hours per week or less and students employed during the school vacation period, save and except managers, persons above the rank of manager, head chef, office and clerical employees, and persons covered by a subsisting collective agreement with Local 756 of the Hotel and Restaurant Employees and Bartenders International Union.” (8 employees in the unit).

1051-76-R: International Union of Operating Engineers, Local 793 (Applicant) v. G. C. Romano Construction Co. (Respondent).

Unit: “all employees of the respondent working in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

1052-76-R: Laborers’ International Union of North America, Local 597 (Applicant) v. Bradsil Ltd. (Respondent).

Unit: "all construction labourers of the respondent working in the County of Ontario (except the Townships of Pickering, Rama, Mara and Thorah) and the County of Durham (except the Township of Hope), save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

1054-76-R: Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Bertrand & Frere Construction Co. Ltd. (Respondent).

Unit: "all employees of the respondent working out of Ste. Isidore de Prescott, Ontario, Township of South Plentagenent, County of Prescott, save and except foremen, those above the rank of foreman, office and sales staff." (4 employees in the unit).

1062-76-R: International Union of Operating Engineers, Local 793 (Applicant) v. Del-Ko Paving & Construction Company Ltd. (Respondent).

Unit: "all employees of the respondent working in the counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, engaged in the operation of cranes, shovels, bulldozers, and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and those above the rank of non-working foreman." (5 employees in the unit).

1072-76-R: Labourers' International Union of North America, Local 837 (Applicant) v. Lincoln Mechanical Contractors (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

1098-76-R: Chatham Construction Workers Association, Local 53, affiliated with the Christian Labour Association of Canada (Applicant) v. Mark Bernik (Respondent).

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*Having regard to the foregoing*).

Applications Certified Subsequent to Pre-Hearing Vote

0460-76-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Robert Hunt Company Limited (Respondent).

Unit "all employees of the respondent at London, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period." (178 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		175
Number of persons who cast ballots	156	
Ballots segregated and not counted	1	
Number of spoiled ballots	4	
Number of ballots marked in favour of applicant	80	
Number of ballots marked against applicant	71	

0815-76-R: Canadian Chemical Workers Union (Applicant) v. Canada Cup, Division of Dart Products National Ltd. (Respondent) v. International Chemical Workers Union, Local 424 (Incumbent Trade Union).

Unit: "all employees of the Canada Cup plant at 2230 Bromsgrove Road, Mississauga, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and persons regularly employed for not more than 24 hours per week." (57 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		53
Number of persons who cast ballots	47	
Number of ballots marked in favour of applicant	43	
Number of ballots marked on favour of incumbent trade Union	4	

0845-76-R: Boot and Shoe Workers' Union, affiliated with Canadian Labour Congress, and the AFL-CIO (Applicant) v. Hillsdale Nursing Home (Respondent).

Unit: "all employees of the respondent at Campbellford, save and except Supervisors, persons above the rank of Supervisor, Registered Nurses, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (30 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		26
Number of persons who cast ballots	22	
Number of ballots marked in favour of applicant	12	
Number of ballots marked against applicant	10	

Applications Certified Subsequent to Post-Hearing Vote

0001-76-R: Service Employees Union, Local 210, Affiliated with Service Employees International Union, AFL-CIO-CLC (Applicant) v. County Village Inc. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent employed at its Nursing Home and Lodge at Woodslee, Ontario, save and except professional medical staff, registered nurses, supervisors, persons above the rank of supervisor, office staff, dieticians, physiotherapists, occupational therapists, students employed during the school vacation period and persons regularly employed for not more than twenty-four hours per week." (51 employees in the unit).

Number of names of persons on revised voters' list		47
Number of persons who cast ballots	43	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	23	
Number of ballots marked against applicant	19	

0744-76-R: Retail, Wholesale and Department Store Union, AFL: CIO: CLC: (Applicant) v. Brockdan Motor Hotel (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Sudbury, Ontario, save and except hotel managers, persons above the rank of hotel manager, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (23 employees in the unit).

Number of names of persons on list as originally prepared by employer		16
Number of persons who cast ballots	15	
Number of ballots marked in favour of applicant	3	
Number of ballots marked against applicant	12	

0801-76-R: Amalgamated Transit Union, Local 1573 (Applicant) v. The Corporation of the City of Brampton, Transit Department (Respondent).

Unit: "all employees of The Transit Department of the City of Brampton, save and except Dispatchers, persons above the rank of Dispatcher, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation." (65 employees in the unit).

Number of names of persons on list as originally prepared by employer		65
Number of persons who cast ballots	58	
Number of ballots marked in favour of applicant	58	
Number of ballots marked against applicant	0	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

7333-74-R: Toronto & District Carpentry Contractors Association (Applicant) v. The Carpenters' District Council of Toronto and Vicinity, United Brotherhood of Carpenters and Joiners of America, Local Union 1190 (Respondent) v. Metropolitan Toronto Apartment Builders Association (Intervener #1) v. General Contractors' Section, Toronto Construction Association (Intervener #2) v. Labourers' International Union of North America, Local 183 (Intervener #3) v. Toronto Form Work Association (Intervener #4) v. Toronto Home Builders' Association (Intervener #5) v. Interior Systems Contractors Association of Ontario (Intervener #6). (535 proposed employers in the unit).

1067-75-R: International Ladies Garment Workers Union (Applicant) v. Ritchie Couture Originale Ltd. (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except designer/cutters, foremen and foreladies, persons above the rank of designer/cutter, foreman and forelady, office and sales staff." (16 employees in the unit).

1701-75-R: Canadian Union of Security Guards (Applicant) v. Centurion Investigation Ltd. (Respondent) v. Group of Employees (Objectors). (140 employees).

0637-76-R: International Union of Operating Engineers Local 796 (Applicant) v. Kellogg Salada Canada Ltd. (Respondent) v. Canadian Union of Operating Engineers (Intervener). (4 employees). **0747-76-R:** Sheet Metal Workers' International Association, Local Union 504 (Applicant) v. Biscombe B.R.S. Ltd., Charles R. Biscombe Limited and Berken Contractors Limited (Respondents). (no employees).

0818-76-R: Christian Labour Association of Canada (Applicant) v. Rest Haven Nursing Home of St. Williams 1974 Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent employed in the City of St. Thomas, Ontario, save and except registered and graduate nurses, supervisors, persons above the rank of supervisor, office and clerical staff, and students employed during the school vacation period." (35 employees in the unit). (*Having regard to the agreement of the parties*).

0822-76-R: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Barne Construction Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent working within a radius of thirty-five miles from the City of Sudbury Federal Building, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0919-76-R: United Brotherhood of Carpenters & Joiners of America, Local 18 (Applicant) v. Beatty-Hall Construction Co. Limited (Respondent). (8 employees).

0998-76-R: Upholsterers International Union of North America AFL/CIO (Applicant) v. Edgewood Furniture Limited (Respondent). (20 employees).

1033-76-R: Labourers' International Union of North America, Local 837 (aaapplicant) v. Gavin Construction Limited (Respondent). (4 employees).

1069-76-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 800 (Applicant) v. Michael R. Newmarch (Respondent). (3 employees).

Certification Dismissed Subsequent to Pre-Hearing Vote

0912-76-R: Canadian Union of Operating Engineers (Applicant) v. King Edward Hotel (Respondent) v. International Union of Operating Engineers, Local 796 (Intervener).

Voting Constituency: "All Stationary Engineers and those persons primarily engaged as their helpers employed by the Respondent in Metropolitan Toronto, save and except Chief Engineer and those above the rank of Chief Engineer." (5 employees).

Number of names of persons on revised voters' list		4
Number of persons who cast ballots		4
Number of ballots marked in favour of applicant	0	
Number of ballots marked in favour of Intervener	4	

Certification Dismissed Subsequent to Post-Hearing Vote

0354-76-R: Canadian Association of Industrial Mechanical and Allied Workers (Applicant) v. E:D:-A.Electronics Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Ottawa Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (45 employees in the unit).

Number of names of persons on revised voters' list		12
Number of persons who cast ballots	12	
Number of ballots marked in favour of applicant	0	
Number of ballots marked against applicant	12	

0793-76-R: Labourers' International Union of North America, Local 183 (Applicant) v. First Federal Management Co., Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Tos of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

Number of names of persons on list as originally prepared by employer		2
Number of persons who cast ballots	2	
Number of ballots marked in favour of applicant	1	
Number of ballots marked against applicant	1	

0943-76-R: Association of Commercial and Technical Employees, Local 1704, Canadian Labour Congress (Applicant) v. National Communications and Data Company Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all office and clerical employees of the respondent in Metropolitan Toronto save and except supervisors, those above the rank of supervisor and secretary to the manager." (36 employees in the unit).

Number of names of persons on revised voters' list		44
Number of persons who cast ballots	35	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	5	
Number of ballots marked against applicant	29	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

0415-76-R: Canadian Independent Automotive Union (Applicant) v. Chrysler Canada Ltd. (Respondent). (69 employees).

0829-76-R: Labourers' International Union of North America, Local 183 (Applicant) v. 318974 Ontario Ltd. (Respondent). (2 employees).

0857-76-R: Labourers' International Union of North America, Local 183 (Applicant) v. 318974 Ontario Ltd. (Respondent). (2 employees).

0858-76-R: Labourers' International Union of North America, Local 183(Applicant) v. Halder Holdings and Halder Construction (Respondent).

(2 employees).

0878-76-R: Labourers International Union of North America, Local 607 (Applicant) v. Peter Leitch Construction Limited (Respondent) v. Lumber and Sawmill Workers Union, Local 2693, of the United Brotherhood of Carpenters and Joiners of America (Intervener). (5 employees).

0906-76-R: Labourers' International Union of North America, Local 527 (Applicant) v. Moffat Materials Ltd. (Respondent). (27 employees).

0921-76-R: International Union of Operating Engineers, Local 793 (Applicant) v. Alnor Earthmoving Limited (Respondent). (12 employees).

0971-76-R: Canadian Food and Allied Workers, chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America (Applicant) v. National Nut Confection Company (Respondent). (44 employees).

0973-76-R: International Union of Operating Engineers Local 793 (Applicant) v. Armbro Materials & Construction Ltd. (Respondent). (64 employees).

0983-76-R: Beclawat Ontario Limited Employees Association (Applicant) v. Beclawat (Ontario) Limited (Respondent). (22 employees).

0990-76-R: Laborers International Union of North America, Local 597, AFL-CIO-CLC (Applicant) v. Bradsil Ltd. (Respondent). (5 employees).

0991-76-R: Laborers' International Union of North America, Local Union No. 597 (Applicant) v. Newton Construction Inc. (Respondent). (7 employees).

0995-76-R: International Union of Operating Engineers, Local 793 (Applicant) v. John Carlo Ltd. & John Carlo Inc., & Northwest Contractor Ltd. (Respondents). (11 employees).

1016-76-R: United Brotherhood of Carpenters and Joiners of America, Local Union 446 (Applicant) v. Andco Anderson Limited (Respondent). (5 employees).

1021-76-R: Ottawa Newspaper Printing and Graphic Communications, Union Local 62 (Applicant) v. Ottawa Citizen and Journal Publishing Company of Ottawa Limited (Respondent). (47 employees).

1073-76-R: Lake Ontario District Council, on behalf of Locals 397, 572, 1071, 1450 of The United Brotherhood of Carpenters and Joiners of America (Applicant) v. Newton Const. (Respondent). (9 employees).

1129-76-R: Beclawat (Ontario) Limited Employees Association (Applicant) v. Beclawat (Ontario) Limited (Respondent). (42 employees).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0560-76-R: Ward R. Hoffman (Applicant) v. Retail Clerks International Association (Respondent). *(Terminated)*.

Unit: "all licensed Motor Vehicle Salesmen of Sinclair Pontiac Buick Ltd. at London, save and except managers and persons above the rank of manager." (8 employees in the unit).

Number of names of persons on revised voters' list		5
Number of persons who cast ballots	3	
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	3	
Number of ballots marked against respondent	3	

0665-76-R: The Corporation of Huron College (Applicant) v. Canadian Union of Public Employees, Local 101 (Respondent). *(Granted)*.

Unit: "all employees of the applicant engaged in maintenance, service and plant operations at London, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (19 employees in the unit).

Number of names of persons on list as originally prepared by employer		19
Number of persons who cast ballots	13	
Number of ballots marked in favour of Respondent	0	
Number of ballots marked against Respondent	13	

0725-76-R: Valerie Rudyke (Applicant) v. Service Employees Union, Local 268 (Respondent) v. The Port Arthur Clinic (Intervener). *(Granted)*.

Unit: "all employees save and except supervisors, persons above the rank of supervisor, credit manager, graduate pharmacists, optometrists, professional medical staff, graduate nursing staff, undergraduate nurses, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (64 employees in the unit).

Number of names of persons on list as originally prepared by employer		59
Number of persons who cast ballots	59	
Ballots segregated and not counted	2	
Number of spoiled ballots	1	
Number of ballots marked in favour of Respondent	18	
Number of ballots marked against Respondent	38	

0918-76-R: Frederick Kuehner (Applicant) v. Local 1824, of the International Brotherhood of Painters, Decorators, Paperhangers of America, (also known as the International Brotherhood of Painters and Allied Trades) (Respondent). (4 employees). *(Dismissed)*.

1009-76-R: Ron Gillett (Applicant) v. Canadian Food and Allied Workers Local Union 175, Chartered by The Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Respondent). (12 employees). *(Dismissed)*.

APPLICATION FOR DECLARATION OF SUCCESSOR STATUS

0308-76-R: Canadian Chemical Workers Union (Applicant) v. Canadian Rexall Corporation (Respondent) v. International Chemical Workers Union and its Local 279 (Intervener). (*Dismissed*).

APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

0963-76-U: Fiberglas Canada Limited (Applicant) v. Don Sonier and others, and Oil, Chemical and Atomic Workers International Union, Local 9-14 (Respondents). (*Direction*).

0984-76-U: Ralph Milrod Metal Products Limited (Applicant) v. See Appendix "A" Attached (Respondents). (*Direction*).

1000-76-U: Marentette Bros. Limited (Applicant) v. John Arnold and Others (Respondents). (*Granted*).

1039-76-U: Nadrofsky Steel Erecting Limited (Applicant) v. Gary Robinson, Eugene Carrol, and Others (See Attached Schedule "A") (Respondents). (*Withdrawn*).

1048-76-U: National Hardware Specialties Limited (Applicant) v. The Employees Names in Schedules A to C, and The International Union United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and UAW Local 580, and Ted Oana, and Carl Hasson (Respondents). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO PROSECUTE

0443-76-U: Ontario Secondary School Teachers' Federation District 1 (Applicant) v. The Board of Education for the City of Windsor, V. Pilotis, W. Mickle, R. Dureno, R.H. Field, B. Ducharme, R. Simpson, A. Newman, F. Clark, G. Hawkins, A. McCrindle, F. Alexander, D. Cooke, B. Newman, Jr., A. Caird, L. Schiller, G. Barichello, and N. Libby (Respondents).

- and -

0445-76-U: Ontario Secondary School Teachers' Federation District 1 (Applicant) v. The Board of Education for the City of Windsor, V. Pilotis, W. Mickle, R. Dureno, R.H. Field, B. Ducharme, R. Simpson, A. Newman, F. Clark, G. Hawkins, A. McCrindle, F. Alexander, D. Cooke, B. Newman, Jr., A. Caird, L. Schiller, G. Barichelli, and N. Libby (Respondents).

- and -

0446-76-U: Ontario Secondary School Teachers' Federation District 1 (Applicant) v. The Board of Education for the City of Windsor, V. Pilotis, W. Mickle, R. Dureno, R.H. Field, B. Ducharme, R. Simpson, A. Newman, F. Clark, G. Hawkins, A. McCrindle, F. Alexander, D. Cooke, B. Newman, Jr., A. Caird, L. Schiller, G. Barichello, and N. Libby (Respondents).

- and -

0447-76-U: Ontario Secondary School Teachers' Federation District 1 (Applicant) v. The Board of Education for the City of Windsor, V. Pilotis, W. Mickle, R. Dureno, R.H. Field, B. Ducharme, R. Simpson, A. Newman, F. Clark, G. Hawkins, A. McCrindle, F. Alexander, D. Cooke, B. Newman, Jr., A. Caird, L. Schiller, G. Barichello, and N. Libby (Respondents). (*Withdrawn*).

0713-76-U: International Molders & Allied Workers Union (Applicant) v. Aeroquip (Canada) Limited (Respondent). (*Granted*).

0808-76-R: International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. Kronos Electric Limited, and Nicholas Kavouras (Respondents). (*Withdrawn*).

1001-76-U: Marentette Bros. Limited (Applicant) v. James Arnold and Others (Respondent). (*Withdrawn*).

1040-76-U: Nadrofsky Steel Erecting Limited (Applicant) v. Gary Robinson, Eugene Carrol and others (See attached schedule "A") (Respondent). (*Withdrawn*).

0828-76-U: Labourers' International Union of North America, Local 1036 (Applicant) v. Howard Avery Construction Limited and Curtis Gartshore (Respondent). (*Withdrawn*).

0819-76-U: Canadian Union of Public Employees (Applicant) v. Kent-Chatham Health Unit (Respondent). (*Withdrawn*).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

0313-76-U: York University Staff Association (Complainant). v. York University (Respondent). (*Withdrawn*).

0356-76-U: Canadian Association of Industrial Mechanical and Allied Workers (Complainant) v. E.D.A. Electronics Limited (Respondent). (*Withdrawn*).

0362-76-U: Service Employees Union – Local 210 (Affiliated with Service Employees International Union) AFL-CIO-CLC (Complainant) v. The Board of Trustees of the Roman Catholic Separate Schools for the City of Windsor (Respondent). (*Granted*).

0459-76-U: International Molders & Allied Workers Union (Complainant) v. Goodwill Electric Supplies Ltd. (Respondent). (*Withdrawn*).

0536-76-U: London and District Service Workers' Union Local 220, S.E.I.U., AFL-CIO-CLC (Complainant) v. Bobier Convalescent Homes (Respondent). (*Withdrawn*).

0537-76-U: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Complainant) v. Regional Municipality of Waterloo (Sunnyside Home) (Respondent). (*Withdrawn*).

0575-76-U: Reginald Stanley Harcourt (Complainant) v. The Canadian Union of Public Employees, Local 1749 and The Board of Education for the Borough of York (Respondents) (*Dismissed*).

0584-76-U Peter George (Complainant) v. Babcock & Wilcox Canada Ltd. and United Steelworkers of America, Local 2859 (Respondents). (*Terminated*).

0587-76-U: Ontario Nurses' Association (Complainant) v. Haliburton, Kawartha, Pine Ridge District Health Unit (Respondent). (*Withdrawn*).

0634-76-U: Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 172, Room 202, 25 Cecil St. Toronto, Ont. M5T 1N1 (Complainant) v. A.N. Shaw Restoration Ltd. (Respondent). (*Dismissed*).

0651-76-R: Jaroslav Rehak (Complainant) v. Local 1005, United Steelworkers of America (Respondent). (*Dismissed*).

0663-76-U: Walter T. Borchenko (Complainant) v. The International Association of Machinists and Aerospace Workers, Local Lodge 1105 (Respondent) v. Koehring Canada Limited, Koehring-Waterous Division (Intervener). (*Dismissed*).

0746-76-U: Sheet Metal Workers' International Association, Local Union 54 (Complainant) v. Biscombe B.R.S. Ltd., Charles R. Biscombe Limited, Berken Contractors Limited, Bernhard Klein, Michael Slawson and Donald Madill (Respondents). (*Terminated*).

0802-76-U: International Leather Goods, Plastics and Novelty Workers' Union, Local 8 (Complainant) v. David Barry Company Limited (Respondent). (*Granted*).

08-76-U: International Brotherhood of Electrical Workers, Local Union 353 (Complainant) v. Kronos Electrical Limited and Nicholas Kavouras (Respondents). (*Withdrawn*).

0827-76-U: Labourers' International Union of North America, Local 1036 (Complainant) v. Howard Avery Construction Limited and Curtis Gartshore (Respondent). (*Withdrawn*).

0833-76-U: John J. Zippilli (Complainant) v. U.A.W. Local 374 (Respondent). (*Dismissed*).

0840-76-U: Teamsters, Chauffeurs, Warehousemen, & Helpers, Local 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Deneau Steels Limited (Respondent). (*Granted*).

0860-76-U: United Cement, Lime & Gypsum Workers International Union (Complainant) v. Custom Aggregates and Custom Concrete Limited (Respondent) v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 230 (Intervener). (*Withdrawn*).

0898-76-U: Ready-Mix Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Active Excavating & Contracting Limited (Respondent). (*Withdrawn*).

0899-76-U: Ready Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers of America (Complainant) v. Active Excavating & Contracting Limited (Respondent). (*Withdrawn*).

0904-76-U: Local #1052 – of the Canadian Union of Public Employees (Complainant) v. The Hydro-Electric Commission of the City of Sudbury (Respondent). (*Withdrawn*).

0925-76-U: Austin Yott (Complainant) v. United Steelworkers of America, Local 6320 (Respondent). (*Withdrawn*).

0929-76-U: Paul Robert Daniel Langille (Complainant) v. Teamsters Union Local 938 (Respondent). (*Withdrawn*).

0941-76-U: Argimino Gaudio (Complainant) v. Armour Elevator Co. (Respondent). (*Withdrawn*).

0950-76-U: Claude Browne (Complainant) v. Canron Ltd., Eastern Structural Division (Respondent) v. Canadian Workers Union (Intervener). (*Granted*).

0966-76-U: Upholsterers International Union of North America, AFL/CIO (Complainant) v. Craft-line Industries Limited (Respondent) (*Withdrawn*).

0967-76-U: United Steelworkers of America (Complainant) v. Canadian Wire Brush Company Division of Sweepco Industries Incorporated (Respondent). (*Withdrawn*).

0974-76-U: Labourers International Union of North America, Local 183 (Complainant) v. Halder Holdings Ltds. (Respondent). (*Withdrawn*).

0978-76-U: Upholsterers International Union of North America AFL/CIO (Complainant) v. Craft-line Industries Limited (Respondent). (*Withdrawn*).

0994-76-U: Communications Workers of Canada (CLC) (Complainant) v. Academy of Medicine/-Toronto – Call Answering Service (Respondent). (*Withdrawn*).

1004-76-U: Canadian Food and Allied Workers, Chartered by the Amalgamated Meatcutters and Butcher Workmen of North America (Complainant) v. Tend-R-Fresh, United Co-operatives of Ontario (Respondent). (*Withdrawn*).

1010-76-U: Service Employees Union, Local 204 affiliated with A.F.L.-C.I.O.-C.L.C. (Complainant) v. Chateau Gardens (Niagara) Inc. (Respondent). (*Withdrawn*).

1038-76-U: Arthur Beauchamp (Complainant) v. Sheet Metal Workers' International Assn. Local Union 504 (Respondent). (*Withdrawn*).

1044-76-U: Upholsterers International Union of North America AFL/CIO (Complainant) v. Craftline Industries Limited (Respondent). (*Withdrawn*).

1045-76-U: Upholsterers International Union of North America AFL/CIO (Complainant) v. Craft-line Industries Limited (Respondent). (*Withdrawn*).

1053-76-U: Canadian Chemical Workers Union (Complainant) v. Country Style Donuts (Respondent). (*Withdrawn*).

1084-76-U: Canadian Union of Public Employees (Complainant) v. The Cochrane-Iroquois Falls District Roman Catholic School Board (Respondent). (*Withdrawn*).

1109-76-U: Boot and Shoe Workers Union (Complainant) v. Hillsdale Nursing Home (Respondent). (*Withdrawn*).

APPLICATION UNDER SECTION 39

0796-76-M: Gordon Arthur Wilson (Applicant) v. Ontario Public Service Employees Union (Respondent Trade Union) v. Sheridan College of Applied Arts & Technology (Respondent Employer). (*Withdrawn*).

APPLICATION FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0939-76-M: Canadian Union of Public Employees Local 910 (Trade Union) v. Carleton University (Employer). (*Granted*).

JURISDICTIONAL DISPUTE

0292-76-JD: Labourers' International Union of North America, à Local 837 (Complainant) v. Halton Renovations Ltd., and United Brotherhood of Carpenters and Joiners of America, Local 38 (Respondents). (*Withdrawn*).

APPLICATION FOR DETERMINATION UNDER SECTION 95(2)

0785-76-M: Canadian Union of Public Employees (Applicant) v. The Corporation of the City of Welland (Respondent). (*Withdrawn*).

REFERENCE TO BOARD PURSUANT TO SECTION 96

0348-76-M: Canadian Rexall Corporation (Employer) v. International Chemical Workers Union (Respondent). (*Granted*).

APPLICATIONS UNDER SECTION 112A

1626-75-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Spanton Plumbing & Heating Limited (Respondent). (*Granted*)

1779-75-M: International Union of Operating Engineers, Local 793 (Applicant) v. Arlington Crane Service Ltd. (Respondent). (*Withdrawn*).

0520-76-M: Labourers' International Union of North America, Local 527 (Applicant) v. Paul D'Aoust Construction Limited and The Ottawa Construction Association (Respondent).(*Dismissed*).

0623-76-M: Mechanical Contractors Association of Ottawa (Applicant) v. J.G. Rivard Limited (Respondent).(*Dismissed*).

0706-76-M: United Brotherhood of Carpenters & Joiners of America, Local Union #38 (Applicant) v. Dickie Construction Company Ltd. (Respondent).(*Granted*).

0804-76-M: Millwright District Council, United Brotherhood of Carpenters and Joiners of America, (Millwright's Local 1916 Mr. R. Trudel (Applicant) v. Nekco Systems Incorporated, (Mr. Jim Neil) (Respondent).(*Granted*).

0900-76-M: Sheet Metal Workers' International Association, Local Union 504 (Applicant) v. Biscombe B.R.S. Ltd., Charles R. Biscombe Limited and Berken Contractors Limited (Respondents).(*Terminated*).

0957-76-M: Local Union 353, International Brotherhood of Electrical Workers (Applicant) v. Cowell Automation and Controls Ltd. and The Electrical Contractors' Association of Toronto (Respondents).(*Withdrawn*).

1043-76-M: International Brotherhood of Painters & Allied Trades, Local 1919 (Applicant) v. Knudsens Painers & Decorators Limited (Respondent).(*Withdrawn*).

1076-76-M: International Union of Operating Engineers, Local 793 (Applicant) v. Ray Countryman Excavating Ltd. (Respondent).(*Withdrawn*).

1096-76-M: The United Brotherhood of Carpenters and Joiners of America Local Union 446 (Applicant) v. Virtanen Flooring (Respondent).(*Withdrawn*).

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

0830-76-R: Canadian Union of Public Employees (Applicant) v. Cherokee Disposals and Construction Limited (Respondent).(*Request Denied*).

0034-76-M: The Carpenters' District Council of Toronto and Vicinity on behalf of Local Union 1190, United Brotherhood of Carpenters and Joiners of America (Applicant) v. O and C Carpentry (Respondent).(*Request Denied*).

STATISTICAL TABLES 2ND QUARTER AND 1ST 6 MONTHS OF FISCAL YEAR 1976-77

TABLE I

APPLICATIONS AND COMPLAINT RECEIVED BY THE ONTARIO LABOUR RELATIONS BOARD

	Number Filed		
	2nd Quarter Fiscal Year 1976-77	1st 6 Months Fiscal Year	
		1976-77	1975-76
I. Certification	259	549	631
II. Declaration Terminating Bargaining Rights	16	37	34
III. Declaration of Successor Status	5	13	20
IV. Declaration that Strike Unlawful	21	66	65
V. Declaration that Lock-Out Unlawful	2	3	—
VI. Consent to Prosecute	14	56	88
VII. Complaint of Unfair Practice in Employment (Section 79)	88	235	135
VIII. Miscellaneous	101	195	72
TOTAL	<u>506</u>	<u>1154</u>	<u>1045</u>

TABLE II

HEARINGS OF THE ONTARIO LABOUR RELATIONS BOARD

	Number		
	2nd Quarter Fiscal Year 1976-77	1st 6 Months Fiscal Year	
		1976-77	1975-76
Hearings and Continuation of Hearings by the Board	378	750	659

TABLE III

**APPLICATIONS AND COMPLAINTS DISPOSED OF
BY THE ONTARIO LABOUR RELATIONS BOARD BY MAJOR TYPES**

	Number Disposed of		
	2nd Quarter Fiscal Year 1976-77	1st 6 Months Fiscal Year	
		1976-77	1975-76
I. Certification	259	538	672
II. Declaration Terminating Bargaining Rights	16	32	34
III. Declaration of Successor Status	6	9	17
IV. Declaration that Strike Unlawful	13	34	45
V. Declaration that Lock-Out Unlawful	3	4	—
VI. Consent to Prosecute	28	45	52
VII. Complaint of Unfair Practice in Employment (Section 79)	119	211	125
VIII. Miscellaneous	75	143	62
	<hr/>	<hr/>	<hr/>
TOTAL	519	1016	1007
	<hr/>	<hr/>	<hr/>

TABLE IV

**APPLICATIONS DISPOSED OF
BY THE ONTARIO LABOUR RELATIONS BOARD
BY TYPE AND DISPOSITION**

	Number of Applications			Number of Employees*		
	2nd Quarter	1st 6 Mths. F.Y.		2nd Quarter	1st 6 Mths. F.Y.	
	Fiscal Year			Fiscal Year		
	1976-77	1976-76	1975-76	1976-77	1976-77	1975-76
I. Certification						
Granted	168	374	442	3776	10617	15949
Dismissed	46	89	131	1928	3360	6408
Withdrawn	45	75	99	1040	1513	1565
TOTAL	<u>259</u>	<u>538</u>	<u>672</u>	<u>6744</u>	<u>15490</u>	<u>23922</u>
II. Termination of Bargaining Rights						
Granted	9	14	22	232	309	307
Dismissed	6	14	10	580	647	205
Withdrawn	1	4	2	64	100	339
TOTAL	<u>16</u>	<u>32</u>	<u>34</u>	<u>876</u>	<u>1056</u>	<u>851</u>

*These figures refer to the number of employees directly affected and are based on the number of employees in the bargaining units at the time the applications for certification were filed with the Board. Totals for applications dismissed and withdrawn are approximate.

TABLE IV

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD BY TYPE AND DISPOSITION (CONTINUED)

		Number of Applications		
		2nd Quarter Fiscal Year 1976-77	1st 6 Months Fiscal Year	
			1976-77	1975-76
III.	Declaration that Strike Unlawful			
	Granted	8	15	22
	Dismissed	1	4	8
	Withdrawn	4	15	17
	TOTAL	<u>13</u>	<u>34</u>	<u>45</u>
IV.	Declaration that Lock-Out Unlawful			
	Granted	1	2	—
	Dismissed	1	1	—
	Withdrawn	1	1	—
	TOTAL	<u>3</u>	<u>4</u>	<u>—</u>
V.	Consent to Prosecute			
	Granted	1	2	8
	Dismissed	3	7	9
	Withdrawn	24	36	35
	TOTAL	<u>28</u>	<u>45</u>	<u>52</u>
VI.	Complaint of Unfair Practice in Employment (Section 79)			
	Granted	10	21	9
	Dismissed	22	41	35
	Withdrawn	87	149	31
	TOTAL	<u>119</u>	<u>211</u>	<u>125</u>

TABLE V

**REPRESENTATION VOTES IN CERTIFICATION APPLICATIONS
DISPOSED OF
BY THE ONTARIO LABOUR RELATIONS BOARD**

	Number of Votes		
	2nd Quarter Fiscal Year 1976-77	1st 6 Months Fiscal Year	
		1976-77	1975-76
Certification after Vote*			
Pre-hearing Vote	11	26	40
Post-hearing Vote	8	15	45
Ballots not Counted	—	—	—
Dismissed after Vote			
Pre-hearing Vote	9	17	21
Post-hearing Vote	10	17	33
Ballots not Counted	1	2	1
TOTAL	<u>39</u>	<u>77</u>	<u>140</u>

*Includes applicant-intervener applications in which both applicant and intervener apply for a new unit and either applicant or intervener is certified.

TABLE VI

**REPRESENTATION VOTES IN TERMINATION APPLICANTS
DISPOSED OF
BY THE ONTARIO LABOUR RELATIONS BOARD**

	Number of Votes		
	2nd Quarter Fiscal Year 1976-77	1st 6 Months Fiscal Year	
		1976-77	1975-76
*Respondent Union Successful	1	1	2
Respondent Union Unsuccessful	8	12	17
TOTAL	<u>9</u>	<u>13</u>	<u>19</u>

*In Termination Proceedings where a vote is taken the applicant is a group of employees or the employer; the incumbent union is thus the respondent.



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ONTARIO LABOUR RELATIONS BOARD REPORTS

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- Whether the Board will conduct a new vote because certain persons were concerned that the segregated ballot procedure would not preserve the secrecy of their vote – Effect of Applicant sending erroneous note to employees as to time and place of vote.
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– Whether the Board will conduct a new vote because certain persons were concerned that the segregated ballot procedure would not preserve the secrecy of their vote.

– Effect of Applicant sending erroneous note to employees as to time and place of vote.

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Termination – Petition – Whether blanks in preamble to petition that resulted in name of union not being set out create a doubt as to the intention of the signators.

JIM BAXENDALE & A GROUP OF EMPLOYEES v. TEAMSTERS' LOCAL UNION NO. 230, READY MIX, BUILDING SUPPLY, HYDRO AND CONSTRUCTION DRIVERS, WAREHOUSEMEN AND HELPERS v. ARMBRO MATERIALS & CONSTRUCTION LTD 743

Trade Union Status – S1(1)(n) – Effect of persons found to be managerial participating in organization of applicant organization mean applicant not an “organization of employees” – Effect of persons found to be managerial collecting membership evidence.

THE STAFF ASSOCIATION OF THE CHILDREN'S AID SOCIETY OF METROPOLITAN TORONTO v. CHILDREN'S AID SOCIETY OF METROPOLITAN TORONTO v. GROUP OF EMPLOYEES 651

1138-76-R The Staff Association of the Children's Aid Society of Metropolitan Toronto, (Applicant), v. **Children's Aid Society of Metropolitan Toronto**, (Respondent), v. Group of Employees, (Objectors).

Trade Union Status – s.1(1)(n) – Effect of persons found to be managerial participating in organization of applicant – s.12 – Whether activities of managerial persons in applicant organization means applicant not an “organization of employees” – Effect of persons found to be managerial collecting membership evidence.

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members O. Hodges and F.W. Murray.

APPEARANCES: *Maurice Green, Martin Koops and Pat Martin for the applicant; T.F. Storie, Anna Bowman and R. Clemett for the respondent; Stuart D. Cairns, Patricia Jones, Helen Stadnyk, Alex Paterson and Anne Taylor for the objectors.*

DECISION OF THE BOARD: November 18, 1976.

2. This is an application for certification.

3. The Registrar, in a letter dated October 1, 1976, advised the applicant that it must be prepared at the hearing in this matter to satisfy the Board that it is a trade union within the meaning of section 1(1)(n) of the Act. Accordingly, the applicant adduced evidence in this regard through Mr. Martin Koops, the Chairman of the applicant organization.

4. The evidence establishes that the applicant organization came into being in February of 1969.

A constitution was put into effect at that time which provided for the election of a staff association representative committee (SARC) whose purpose it was to act as a means of communication between the staff, on the one hand, and the Executive Director and the Board of Directors, on the other, to negotiate and advance working conditions and salaries and to perform other functions deemed to be in the best interests of the staff. The 1969 constitution allowed into membership all employees of the Children's Aid Society of Metropolitan Toronto up to and including those who were employed at the level of department head. The respondent and the Staff Association enjoyed an harmonious relationship in the first years of the applicant's existence, and indeed, in early 1971 a form of payroll dues deduction (50¢ per month) was worked out between the staff association and the employer. The evidence establishes, however, that commencing in 1972 at the time of provincial funding, cut-backs and resultant staff reductions, the relationship between the Staff Association and the employer became strained. Mr. Koops testified that there were wide differences between the two and that the situation was “tense”. Consequently, a motion was carried at a staff association representative committee meeting (SARC) on September 18, 1975 by a vote of 9-2 which read as follows:

“That Staff Association become the legal bargaining agent on behalf of Staff Association members in the various employment categories with the administration and Board of Directors of the Children's Aid Society of Metropolitan Toronto.”

5. The SARC motion was put to a membership meeting on November 14, 1974 at which time it was decided to establish a SARC sub-committee to study and make recommendations with respect to a formalized collective bargaining relationship. The sub-committee sought independent legal advice as to the adequacy of its constitution vis-a-vis the Labour Relations Act and was advised on July 21, 1975 as follows:

"Paragraph 2(a) relating to eligibility for membership should be amended to read:

'All employees of the Children's Aid Society of Metropolitan Toronto receiving benefits in addition to a salary or wage including probationary and regular employees save and except those employees exercising managerial functions.'

Paragraph 3 relating to aims and objectives should be amended by deleting the present aims and objectives and replacing them by the following:

- (a) to act as bargaining agent for employees and to regulate the relations between the said employees and the society in order to establish better rates of pay, hours of work and conditions of employment, and to adjust disputes arising out of such matters in an equitable manner;
- (b) to promote the interest and welfare of members and their families."

6. The constitution was shortly thereafter amended in accord with the independent legal advice which had been received. These constitutional amendments were a manifestation of the intention of the Association to seek trade union status and to formalize its relationship with the respondent. It was moved at a Staff Association Representative Committee meeting held on November 20, 1975 that a letter be sent to Mr. Watson, the Executive Director of the Children's Aid Society of Metropolitan Toronto, stating that in accord with the recent constitutional amendments no Staff Association member was to participate in any kind of agreement with management. At a subsequent meeting held on December 11, 1975 a motion was seconded and carried which was recorded in the minutes of that meeting as follows:

"It was MOVED that a letter be sent to those members who no longer are eligible, that their due deductions be stopped and that the wording to those members should be as follows:

The membership of the Association on November 10-14, 1975, voted to become a Collective Bargaining unit and to change the eligibility for membership. Since you clearly have a management function, we can no longer consider you a member of the Staff Association."

7. The Staff Association conducted a referendum in late February 1976 in order to ascertain the wishes of its members with respect to the choice between certification and voluntary recognition and as to the appropriate level of managerial exclusion from member-

ship in the applicant. Mr. E. F. Watson, the executive director of the respondent, set out the employer's point of view on these matters in a memo to staff dated February 12, 1976, ten days before the commencement of the referendum. His memo, which is critical to the determination of this matter, is set out in part below:

"During the week of February 23rd to 27th members will be voting on a third referendum dealing with a number of issues. Because I and the Service Management Group think it extremely important for present understanding and future clarity in relationships between a collective bargaining unit, whatever form it may take, and administration and Board, we want to make some comment and clarification on two of the issues on which staff will be voting so they will have a clear understanding of the Agency's position on these matters.

The two issues of great importance and concern to us are

- (a) who shall be included in the bargaining unit, and
- (b) the impact which that decision might have upon the Agency's position concerning the alteration between Voluntary Recognition and Certification.

The inclusion of all first level supervisors presents an extremely ambiguous and potentially controversial issue for management and perhaps for the way in which some first level supervisors view their position on this matter.

While the Staff Association Constitution defines eligibility for membership in the following way:

- '(a) *Eligibility*: All employees of the Children's Aid Society of Metropolitan Toronto receiving benefits in addition to a salary or wage including probationary and regular employees save and except those employees exercising managerial functions.'

management's view would be that first level supervisors in social work, child care, office services, and other resource departments, do in fact clearly exercise "managerial functions" and should be excluded from a Bargaining Unit. This is Management's view and it would appear to be the intent of the Staff Association's own eligibility clause.

It is a matter of record and established practice that first level supervisors direct, co-ordinate and evaluate the activities of staff reporting to them. This includes assigning work; ensuring completeness and accuracy of assignments, appraising individual staff performance; providing supervision and consultation, ensuring orientation and instruction of new employees; as well as active participation with the Department Head in hiring, transferring or terminating staff.

Various sections of the Personnel Manual recognize the managerial functions of first level supervisors, one case in particular being Section 3, Subsection 25, paragraph .02 dealing with disputes that states "An employee will discuss a complaint with his/her immediate supervisor in the first instance..."

For this reason, it is important for staff to recognize:

- (1) The Agency believes that first level supervisors carry a substantial managerial function and should not be part of the bargaining unit

and

- (2) The Agency would be unable to agree to voluntary recognition if the first level supervisors are included in the bargaining unit.

We believe staff should also know that there would be other exclusions which management would insist upon in the determination of a bargaining unit, such as secretarial staff involved in confidential labour relations matters. Such exclusions are not in any way unique or unusual but are in accordance with the provisions of the Labour Relations Act.

We state this at this time not in any way to influence or interfere with the free exercise of staff's rights and prerogatives to bargain collectively, but to inform staff what position the Agency would have to take on these two vital issues. By stating this position openly at this time, it would be our intention to avoid conflict or misunderstanding at a later date. We believe staff have a right to know this position prior to the referendum.

Because we are aware and have very considerable respect for the position in which first level supervisors may see themselves in a changed relationship between management and staff, Branch and Service Directors intend to meet with them as soon as possible to discuss these matters openly and frankly."

(emphasis added).

8. The results of the referendum in respect of these two issues was conveyed to the membership in a notice of meeting (May 6, General Membership meeting) in the following terms:

- "(a) We chose to include all those members below the level of department head, and
- (b) We chose to establish a formal collective bargaining relationship through the application to the Labour Relations Board for a certificate as a bona fide collective bargaining organization."

9. The inclusion within the Association of persons within the classifications referred to as managerial in Mr. Watson's memo to staff dated February 12, 1976 and the subse-

quent application for a bargaining unit encompassing these classifications has resulted in a bargaining unit dispute between the parties in respect of 96 persons. The employer alleges that these persons exercise managerial authority or are employed in a confidential capacity under section 1(3)(b) of the Act. Mr. Koops in cross-examination admitted that the persons in the disputed classifications actively participated in the steps taken by the applicant to transform itself into a trade union. Indeed, the evidence establishes that two of these persons, Lynne Thompson and Mary Latter, social work supervisors, were members of the applicant's organizing committee.

10. Much of the evidence before the Board goes to the nature of the relationship between the employer and the applicant in the period preceding the filing of this application. The evidence is clear that all of the advice and counsel received by the Association in respect of collective bargaining was independent and untainted by employer influence. Similarly the outward manifestations of the relationship were of an arm's length nature. The Association stopped holding meetings on company premises in the summer of 1974 and in May of 1976 the Association, on the advice of counsel, instructed the employer that all dues deductions were to be ceased. Indeed, counsel for the respondent acknowledged that the relationship between the respondent and the Staff Association was, at all relevant times, an arm's length relationship. It is clear that the disputed employees did not consider themselves to be included in the managerial exclusion, and in attempting to transform the association into a certifiable trade union, they were acting on their own behalf, and on behalf of the other employees – *not* on behalf of the respondent employer.

11. The fact situation of this case gives rise to three issues which must be dealt with by the Board. The *first issue* relates to the application of Section 12 of the Act. Section 12 of the Act reads:

"The Board shall not certify a trade union if any employer or any employer's organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of his race, creed, colour, nationality, ancestry or place of origin."

The respondent employer argued that if the persons in the disputed classifications are found to be managerial then, in the face of evidence which establishes that they were active in the transformation of the applicant organization, the Board must apply the section 12 bar and refuse to certify. The respondent relied on the *Leamington Hospital* case [1973] OLRB Rep. June 376. The Board in that case found a group of head nurses to be managerial and imposed the Section 12 bar when it was also found "that the head nurses actively participated in the formation of and contributed their support to the applicant including the adoption of its constitution." The Board must decide in the instant case if the evidence of an arm's length relationship between the employer and the applicant is sufficient to remove the applicant from the ambit of Section 12 or if, notwithstanding the arm's length relationship, a finding of managerial status under section 1(3)(b) in respect of the persons in the disputed classifications activates the Section 12 bar.

12. The *second issue* which falls to the Board is the determination of whether the applicant organization is a trade union within the meaning of Section 1(1)(n) of the Act. Section 1(1)(n) of the Act defines a trade union in the following terms:

“trade union” means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national or international trade union and a certified council of trade unions.”

The Board must ask itself, “Is the applicant a trade union defined by the Act?” and answer that question having regard only to the statutory definition. (See *C.S.A.O National (Inc.) and Oakville Trafalgar etc.* 1972 OLRB Rep. 498). Section 12 of the Act and the definition of trade union interrelate in so far as a trade union which has been the recipient of employer support within the meaning of Section 12 could not, as required by the definition, regulate employer/employee relations as that requirement is construed within The Labour Relations Act, nor could it sign a collective agreement (see section 40). It could not therefore have been intended that such an organization could be found to be a trade union within the meaning of Section 1(1)(n). The definition also stipulates that a trade union be an “organization of employees” and as a result the application must satisfy the Board in this regard notwithstanding the possibility that a number of the persons involved in the organization were not employees for purposes of the Act. The Board has found in both the *Hydro Electric Power Commission* case [1971] OLRB Rep. Aug. 501 and the *Armour Associates Ltd.* case [1976] OLRB Rep. March 117 that an organization of both employees and persons exercising managerial functions is not a trade union within the meaning of the Act. The Board, therefore, in addressing itself to the status of the applicant under section 1(1)(n) must consider the effect of a finding under section 1(3)(b) that certain persons who have been and continue to be active in the applicant organization exercise managerial functions.

13. The *third issue* raised by the peculiar fact situation of this case (which also stems from the possibility of a finding under Section 1(3)(b) that certain persons active in the applicant organization exercise managerial functions) goes to the quality of the membership evidence. The Board found in the recent *Veres Wire Industry Limited* case [1976] OLRB Rep. July 337 that the applicant trade union was duty bound to purge its campaign of the taint created by the participation in its organizational campaign of a person whom the majority of employees in the bargaining unit would have viewed as their “boss”. In that case, membership in the union was solicited by an employee subsequently found to be managerial. The failure of the applicant to call evidence to dispute the inferences flowing from the evidence of managerial status contained in the Examiner’s Report caused the Board to state at paragraph 12:

“As a result we cannot conclude that those employees’ true wishes were reflected in the membership cards filed by the applicant in support of its efforts to acquire bargaining rights on their behalf.”

(See *McCarthy Milling Company Ltd.* case 54 CLLC 17,070 at p. 1477). The admitted involvement in the applicant organization of a number of persons challenged as managerial and in particular the presence on the applicant’s organizing committee of two social work supervisors places an onus on the applicant if these persons are found to be managerial. The applicant acted at its peril when in the face of the employer’s clear statement of its position vis-a-vis the disputed classifications (see paragraph 7 hereof) the applicant allowed certain of these persons to become involved in its membership campaign. If a finding of managerial status is made the applicant must be prepared to satisfy the Board that the membership evidence submitted in support of the application is evidence of the true wishes of the employees.

14. The respondent characterizes the first issue, the Section 12 bar, as a simple one which hinges on a board finding under section 1(3)(b) as to the status of persons in the disputed classifications. The respondent's argument presupposes that for purposes of Section 12 the prohibited participation by an "employer" or "employers' organization" in the formation or administration of a trade union includes participation by persons *later* found to be managerial under section 1(3)(b) of the Act regardless of the nature of the participation. Notwithstanding the *Leamington Hospital* case the Board does not accept this interpretation of Section 12 of the Act. The Board recognizes that in the modern organizational setting the interests of individual persons deemed to be managerial are not necessarily coincidental with those of the employer. If the evidence establishes that such persons acted on behalf of or in the interests of the employer then undoubtedly the Section 12 bar would apply. If, however, the evidence establishes that the persons were acting not on behalf of the employer but contrary to the wishes and interests of the employer (see *Air Liquide* case [1964] CLLC 16,002) then it cannot be said that the employer has participated contrary to Section 12, or section 56 for that matter. Similarly if the evidence establishes that the disputed persons have been acting in their self interest rather than on behalf of or in the interest of the employer, then again Section 12 should not be activated.

15. The Act has been designed to allow the Board to resolve questions of employee status as they arise during a certification proceeding (Section 6(1)) and as they arise during the course of bargaining or during the operation of a collective agreement (Section 95(1)). These determinations do not per se undermine trade union status nor do they per se activate Section 12 of the Act, nor do they per se invalidate collective agreements. The Board stated in the *Chrysler Canada Ltd.* decision [1975] OLRB Rep. Nov. 852 at para. 13:

"...The prohibitions contained in those sections of the Act ought not to be applied to persons who, while they may exercise managerial functions, are not in fact acting on behalf of management in joining or supporting the union but, rather are pursuing their own economic interests in the mistaken belief that they have the right to organize and bargain collectively under the Act. This notion was expressed in a different but analogous context in the *Air Liquid* case 64(3) CLLC para. 16,002. Moreover, there are many instances where management personnel have erroneously been thought to qualify as employees within the meaning of the Act and the Board has declared otherwise in applications under section 95(2). Indeed, the very existence of section 95(2) reflects a recognition by the Legislature that determinations as to employee status may be required, either during bargaining or during the life of the collective agreement, a recognition which, in our view, tends to negate the inference that the mere presence of management personnel within union membership ranks necessarily destroys the union's status or nullifies the collective agreement to which it is a party."

The Act contemplates that these disputes will arise within the context of modern organizations and has provided a means for their resolution. The resolution does not necessarily affect trade union status and does not necessarily activate Sections 12 or 40. The Board can see no reason why Section 12 should be activated in respect of an organization seeking status as a trade union and not in similar circumstances (i.e. bargaining unit dispute) in respect of a trade union which has established status.

16. In the absence of a statutory vehicle for the determination of employee status prior to the filing of an application for certification the respondent's interpretation of Section 12 would require an organization seeking recognition as a trade union to correctly guess the status under section 1(3)(b) of those it is seeking to organize, and to purge all those who *might* be managerial or risk the imposition of the Section 12 bar. The result is unfair to the applicant and is inconsistent with the general application of Section 12 vis-a-vis Section 1(3)(b). A finding of managerial function under Section 1(3)(b) in respect of person(s) who actively participate in the formation of the trade union does not in and of itself activate Section 12 of the Act. Rather a finding of managerial status in respect of these persons must be coupled with evidence which establishes that they were acting on behalf of or in the interests of the employer.

17. There is no evidence before the Board in the instant case to suggest that any of the persons in the disputed classifications were acting on behalf of or in the interests of the respondent employer. The respondent has acknowledged that the relationship between itself and the applicant was at arm's length and indeed, Mr. Watson's memo of February 12, 1976, which is reproduced in part in paragraph 7 hereof, indicates to the Board that the persons in the disputed classifications who involved themselves in the applicant's transformation did so against the wishes of the employer. In the circumstances the Board must find that even if the persons in the disputed classifications are found to exercise managerial function under section 1(3)(b) their participation in the applicant organization does not bar this application under Section 12 of the Act.

18. The second issue to be decided by the Board is whether the applicant is a trade union within Section 1(1)(n) of the Act. The Board is satisfied that the applicant took the necessary steps to properly constitute itself vis-a-vis Section 1(1)(n) of the Act. (See *York University* case [1976] OLRB Rep. Apr. 181). The evidence establishes that the applicant subsequently purged itself of those persons who *in its opinion* clearly exercised managerial functions and were therefore ineligible for membership in accord with the amended constitution. Nevertheless, there are a number of persons who were active in the move to amend the constitution and who are presently members of the applicant whose status under section 1(3)(b) of the Act has been challenged by the employer. The Board has found in both the *Hydro* case (supra) and the *Armour Associates* case (supra) that an organization of both employees and persons exercising managerial function is not a trade union within the meaning of Section 1(1)(n) of the Act. What then would be the effect on the applicant's status of a finding under Section 1(3)(b) that the persons in the disputed classifications were not employees for purposes of the Act?

19. As was noted in paragraph 15 herein the Act contemplates that there will be disputes as to the status of persons for whom the trade union seeks bargaining rights and gives the Board authority to determine these issues. There is, however, as was noted in paragraph 16 herein, no statutory vehicle which gives the Board the authority to make these determinations prior to the filing of an application for certification, and in the result, if we were to decide that a finding of managerial status in respect of the persons in the disputed classifications automatically undermined the trade union status of the applicant, the Board would be requiring the applicant to correctly guess the status of those for whom it seeks bargaining rights or risk not being found to be a trade union within the Act. It would be an impossible and unfair requirement if a single miscalculation could result in a denial of status. A trade union cannot be expected to correctly anticipate the Board's decision vis-a-vis Section 1(3)-

(b). If it attempts to do so and purposely excludes persons in classifications which are questionable it leaves itself vulnerable on the count and if it includes these persons it risks a finding of no status.

20. The test as to whether the applicant is an organization of employees must be based on the eligibility for membership of persons found to be managerial and not simply on the finding of managerial function itself. If such persons are eligible for membership, then clearly the organization is not an organization of employees and the potential for conflict of interest, which is alien to the intent of the Act and the definition of trade union, is established. If, however, the persons found to be managerial are not eligible for membership, the potential conflict of interest does not exist in that the constitutional bar to membership would be activated upon a Board finding of managerial function under Section 1(3)-(b).

21. In the instant case the constitution of the applicant excludes from membership those persons exercising managerial functions. The Board reads the applicant's constitution in light of the statutory requirements which it is attempting to satisfy, (see *Chrysler of Canada* (supra)) and finds that the constitution excludes from membership persons who exercise managerial functions or are employed in a confidential capacity within the meaning of Section 1(3)(b) of the Act. The fact situation before this Board, therefore, can be distinguished from that which was before the Board in both the *Hydro* case (supra) and the *Armour Associates* case (supra). In both the above referred to cases the constitution and practice of the applicant was to allow into membership persons found not to be employees within Section 1(3)(b) of the Act. In the circumstances the potential for conflict of interest existed and the applicant organizations were properly found not to be trade unions within the meaning of section 1(1)(n).

22. The constitution of the applicant organization in this matter bars from membership persons found not to be employees within the meaning of section 1(3)(b) of the Act. If, therefore, the persons in the disputed classifications are found not to be employees within the meaning of Section 1(3)(b) they will not be eligible for membership in the applicant and neither were they eligible for membership at the date of this application and as a result their "membership" must be found to have been a nullity at that time. Notwithstanding any subsequent Board finding that the persons in the disputed classifications are managerial, the Board is satisfied that the potential for conflict of interest does not exist within the applicant organization and that as of the date of application it was an organization of employees capable of the regulation of employer/employee relations within the meaning of Section 1(1)-(n) of the Act.

23. Following the Board hearing in this matter the parties met to discuss the differences between them with respect to an appropriate bargaining unit. By letter dated October 26, 1976, counsel for the applicant advised the Board that the applicant had agreed to the exclusion of a number of classifications, which were set out, thereby reducing the total number of persons who are challenged under Section 1(3)(b) of the Act to 96. Accordingly, the Board appoints C.F. Robicheau, Labour Relations Officer, to meet with the parties, determine from them the classifications which remain in dispute, make the necessary inquiries as to duties and responsibilities and report to the Board.

24. This matter is referred to the Registrar.

1032-76-M Engineered Structures and Components, (Employer), v. The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 3227, 3233 of the United Brotherhood of Carpenters and Joiners of America, (Trade Union.)

Reference – Arbitration – s.96 – Whether the Minister may refer to the Board a question as to the existence of a collective agreement where no request for an appointment has been made.

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members F. W. Murray and O. Hodges.

APPEARANCES: *Norman L. Mathews, Q.C. and Dennis John Hawley for the employer; Harold F. Caley and Fred Leach for the trade union.*

DECISION OF THE BOARD: November 26, 1976.

1. The Minister has referred to the Board the question as to whether the Minister has authority under The Labour Relations Act to refer to the Board the question of the existence of a collective agreement in this case.
2. If the Board finds that the Minister does have the authority to refer the question of the existence of a collective agreement to the Board, the Minister refers to the Board the question of whether or not the collective agreement was in existence between the parties at the material times.
3. Underlying the reference is an issue which arose before a board of arbitration conditionally constituted. The trade union was seeking to have the board of arbitration rule upon a grievance which, the trade union alleged, was based upon the provisions of a collective agreement that it claims exists between it and the employer. The employer denies the existence of a collective agreement and, consequently, denies the jurisdiction of any board of arbitration purporting to be constituted under its terms.
4. The employer initially declined to appoint a nominee to the proposed board of arbitration but, following notification that the Minister would appoint on default by the employer, the employer named a nominee to the arbitration board. The nomination was made without prejudice to the company's position that a collective agreement did not in fact exist.
5. The question then arose before the conditionally constituted board of arbitration as to whether the latter could decide the basic question as to the existence or non-existence of a collective agreement from which it would derive its own jurisdiction to deal with the initial dispute.
6. The board of arbitration concluded that it does not have the jurisdiction to determine whether the collective agreement exists.
7. The trade union then requested the Minister to refer to the Ontario Labour Relations Board, pursuant to the provisions of section 96 of the Act, the question as to whether or not there exists a collective agreement. It might be noted at this point that the question of

the legal right of a board of arbitration to find its own jurisdiction in the circumstances outlined herein is not before this Board. It is also important to note that the request of the union is not for the appointment of a member to a board of arbitration.

8. Section 96(1) of the Act is in the following terms:

“96.-(1) Where a request is made under section 15 or subsection 4 of section 37, the Minister may refer to the Board any question that arises that in his opinion relates to his authority to make an appointment under any such provision that is mentioned in the reference, and the Board shall report to the Minister its decision on the question.”

9. Section 15 referred to in the above subsection deals with the appointment of conciliation officers and, consequently, has no application to the present matter.

10. Section 37 has more relevancy in that it deals with arbitration and in subsection 4 states:

“37.-(4) Notwithstanding subsection 3, if there is failure to appoint an arbitrator or to constitute a board of arbitration under a collective agreement, the Minister, upon the request of either party, may appoint the arbitrator or make such appointments as are necessary to constitute the board of arbitration, as the case may be, and any person so appointed by the Minister shall be deemed to have been appointed in accordance with the collective agreement.”

11. Simply to read section 96 is to find that it obviously has to do only with the question of the Minister's power to make appointments under either of the above sub-sections. There is no suggestion in the Act of any power in the Minister to refer to the Board any question with respect to the existence of a collective agreement.

12. The Board has found it necessary, on occasions, when dealing with the power to appoint in either of the situations referred to above, to decide the question as to the existence of a collective agreement as a step towards formulating advice to the Minister with respect to the power to appoint. The Board has also decided the same question, pursuant to the powers conferred upon it under section 95 of the Act, when it arose during the course of other proceedings.

13. The present matter, however, does not come before the Board on an original invocation but, as already noted, as the result of a Ministerial reference. It is therefore governed entirely by the provisions of section 96(1). That being the case, the answer to the first question posed by the Minister is “no”.

14. We should point out to the parties that even if the Board were to find that the Minister has authority to put the first question to the Board, the Board could not give a determinative decision on the second question of the reference. The reason for that is to be found in the *Kitchener Food Market* case (1966) 2 O.R. 513 C. of A., the headnote to which states:

"A decision of the Board, in response to such a request by the Minister, is for the purpose of informing the Minister, and is not a decision that affects rights or imperils the interests of a party since it is only the subject matter of a report from which nothing flows unless the Minister takes some further step. Unlike a decision of the Board on a matter referred to it on original invocation of its jurisdiction by a party, a decision made in answer to a reference by the Minister is nothing more than advice by the Board to him, has no independent effect and hence is not subject to attack by certiorari."

15. Evidence was heard by the Board on the question of the existence of a collective agreement. However, in view of the foregoing and the possibility of the question being raised in other proceedings the Board is of the opinion that it ought not to make finding on that question.

1199-75-R Toronto Newspaper Guild, Local 87, The Newspaper Guild. (Applicant), v. **The Globe & Mail Limited**, (Respondent), v. Group of Employees, (Objectors).

Employee Bargaining Unit – s. 1(3)(b) – Whether District Sales Representatives of large newspaper are excluded – Effect of past decisions of the Board excluding such persons – Whether the exercise of the DSR's duties would create a conflict with union membership – Whether the legal concept of the managerial exclusions has undergone change in recent years.

– Whether province-wide bargaining unit appropriate – Effect of related employees bargaining on province-wide basis.

BEFORE: David H. Kates, Vice-Chairman, and Board Members H.J.F. Ade and H. Simon.

APPEARANCES: *Jeffrey Sack and John T. Bryant for the applicant; R.V. Hicks, Q.C. and O.R. McGuire for the respondent; Terry Vokes for the objectors.*

DECISION OF THE BOARD: November 24, 1976.

1. This is an application for certification where the applicant trade union seeks bargaining rights on behalf of a bargaining unit of "District Sales Representatives" employed by the respondent in its circulation department in Metropolitan Toronto.

3. The main issue raised by the parties pertained to the status of the District Sales Representative (hereinafter referred to as the "DSR") to enjoy the benefits of collective bargaining, having regard to the managerial provisions of The Labour Relations Act. In this regard, section 1(3)(b) of the Act reads as follows:

1.-(3) Subject to section 80, for the purposes of this Act, no person shall be deemed to be an employee'

- (a) who is a member of the architectural, dental, land surveying, legal or medical profession entitled to practise in Ontario and employed in a professional capacity; or
- (b) who, *in the opinion of the Board*, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

4. The historical circumstances precipitating the instant application are highly relevant to the disposition of the questions of fact and law raised by counsel during the course of the Board's inquiry. In July 1963, the applicant was granted bargaining rights covering all employees engaged in the respondent's circulation department in the Province of Ontario. (See *The Globe and Mail Limited Case 63 CLLC* ¶16,290 at p.1201.) The crucial issue in that application was the employment status of DSRs for purposes of the Act. The respondent submitted that the DSR was an independent contractor, and therefore ought not to be considered as an employee eligible for inclusion in the appropriate bargaining unit. Alternatively, it was argued that the DSR, to the extent he exercised supervisory duties and responsibilities over the respondent newspaper's carrier force, was employed in a managerial capacity and therefore was ineligible for inclusion in the bargaining unit. The Board made no ruling with respect to the respondent's initial submission in connection with the status of the DSR as independent contractor. But with respect to the second submission the Board, having regard to the contents of the Labour Relations Officer's report, found that the DSR was solely responsible for the selection, training and supervision of the carriers *whether independent contractor or employees* and therefore excluded him from the bargaining unit because of his exercise of managerial functions. In that case, as in the instant situation, there was no dispute that the persons constituting the carrier force were independent contractors.

5. Incidental to the findings of fact with respect to the merits of the DSR's managerial status the applicant trade union submitted that the Board was precluded from finding "that a person exercising managerial functions over persons who are not employees of the manager's own employer" exercise managerial functions under section 1(3)(b) of the Act. In that particular instance, as in the situation before us, there was no dispute that the DSR did not exercise any supervisory responsibilities over employees of *The Globe & Mail*. In resolving to set aside the applicant union's submission, the Board determined that the phrase "management functions" was sufficiently elastic in nature to comprehend "the supervision of persons over other employees than those of the manager's own employer". In resolving both the merits of the employment status of the DSR and the incidental legal argument with respect to the scope of section 1(3)(b) as it related to the supervision of "other employees", the Board relied upon the precedent set in *The Telegram Publishing Co. Ltd.* case, 59 CLLC ¶18,126 at p.1747.

6. *The Telegram* case is of some relevance in completing a historical perspective of the issues raised by counsel in the instant case. Apparently, on April 7, 1957, the Board certified Local 87 of the Toronto Newspaper Guild for an all employee unit engaged in the respondent's circulation department. The DSRs were included in the certified bargaining unit. (See: *The Telegram Publishing Co. Ltd.* case (supra) at p.1746.) Indeed, "there was no suggestion by either party in the course of the certification proceeding that the district managers exercised managerial functions which would have excluded them from the bargaining unit". During the course of negotiations for a collective agreement, a question arose with re-

spect to the status of the district managers as employees for purposes of the Act, having regard to the employer's attempt to convert persons employed as district managers to independent contractors. During the course of negotiations the employer had terminated the district managers and entered into individual contracts governing their new relationship with *The Telegram*. A reference was submitted to the Board under section 95(2) of the Act (then section 68(2)) with respect to the independent status of the district manager. The significant issue put to the Board was the effect of those individual contracts on the employment status of the district manager. Alternatively, the question of the status of the district manager, because of his alleged exercise of managerial functions, was also raised in issue. The Board in that case found it unnecessary to definitively answer the independent contractor issue (although the Board was inclined to view them as employees in the common law sense rather than independent contractors) because it was persuaded that the district manager, for the reasons set out in paragraphs 4 and 5 herein, exercised managerial functions with respect to their responsibilities in managing the newspaper's carrier force.

7. To complete the historical chronology of the evolving jurisprudence, some reference should also be made to *The Montreal Star Company Limited* case, 1963, File #2862-16-R-195, Monthly Information Bulletin, Department of Labour, Quebec, April 1963, p.81. In that case, the status of district managers, *inter alia*, was the subject matter of dispute during the course of a representation application involving the employees assigned to the circulation department at the *Montreal Star*. In that application, Judge Gold found the district managers ought to be excluded from the bargaining unit by virtue of the relevant managerial provisions of the Quebec Act. In his decision, Judge Gold, to a significant extent, was persuaded by the pronouncements of the Board in *The Telegram* case (*supra*) in reaching his conclusions of fact and law. (See: *The Globe and Mail* case (*supra*) at pp. 1198-9.) In 1963 the Board, in relying upon the rulings of both *The Telegram* case and *The Montreal Star* case to all intents and purposes sealed the fate of the eligibility of the DSRs retained by the respondent to the benefits of collective bargaining until the applicant renewed its challenge in September 1975.

8. In the intervening period, both parties have negotiated and consummated a series of collective agreements governing the terms and conditions of employment of employees assigned to the various classifications of the respondent's circulation department, without apparently questioning (in a formal sense) the employment status of the DSR. The applicant trade union initiated proceedings under section 95(2) of the Act requesting a ruling of this Board with respect to the status of the DSR for purposes of this Act as an incident to a grievance proceeding commencing under the terms of the subsisting circulation department agreement. The applicant trade union submitted that the reference under section 95(2) "would serve some useful purpose" in expediting the arbitration process. The filing of the reference was followed by the instant application for certification on October 31, 1975. In the interim, the Board, by its decision dated November 27, 1975, held the reference case in abeyance pending the outcome of the instant application. (See: *The Globe and Mail Limited* case, [1975] OLRB Rep. Dec. 943, at p.945.) Almost concurrently with these proceedings, counsel for the applicant trade union filed a judgment of the Quebec Labour Court per Judge Maurice R. Marcotte, dated June 5, 1975, upholding a finding of a Commission of Inquiry determining that district sales managers assigned to the circulation department at *The Montreal Star* were properly included in a bargaining unit of employees pursuant to a representative application initiated under the relevant provisions of *The Labour Code* (P.Q.). In that decision, the Commission of Inquiry upheld many of the pronouncements made by

Judge Gold in his 1963 decision, particularly with respect to the definition of manager in the sense that "he may direct and control a department or an operation or a phase of the business by dealing directly with persons other than employees of his employer". (See paragraph 13 herein.) Nonetheless, in having particular regard to "the profound changes" that had been effected in the circulation department since the Gold decision, the Commission adopted the applicant trade union's argument that the district sales manager did not exercise managerial functions and therefore ought to be included in a bargaining unit of employees. (See: *The Montreal Star (1973) Ltd.* case (unreported) dated February 10, 1975, (File No. M-2862-22).)

9. The Board in measuring the duties and responsibilities of the DSR for purposes of section 1(3)(b) of the Act has paid some regard to the historical context in which the parties' submissions on the contents of the Report of the Labour Relations Officer were made. The applicant's submission is basically two-fold. In the first instance, it is argued that there has occurred, through the effluxion of time and the evolution of the Board's perception of "the exercise of managerial functions" as demonstrated by our decisions since 1963, a dramatic change in the law. This change is alleged to have arisen as a result of the Board's experience in reviewing the decision-making processes in large bureaucratic, white-collar establishments where the anatomy of decisions affecting policy has been dissected in order to determine the independent, autonomous individual responsible for the discretionary exercise of power. In this regard, counsel demonstrated the evolvement of the Board's liberalized outlook by chronologically reviewing the Board's decisions that culminated in *The McIntyre Porcupine* case [1975] OLRB Rep. Apr. p.26. Counsel's second submission pertained to the alleged changes in duties and responsibilities during the intervening years with respect to the limitations imposed on the district service representative in supervising the respondent's carrier force. Where in 1963 the DSR was "solely" responsible for the selection, training and supervision of the carrier force, the respondent can no longer make this assertion as a result of its changes in policy (implemented in the Spring of 1975) with respect to servicing and promoting the sale of the *Globe and Mail*. Counsel for the employer argued, basically, that in his view, the Board's perception of the exercise of managerial responsibility has not been radically transformed since the date of the initial *Globe and Mail* case. He conceded that there has been a perceptible change of outlook by the Board with respect to the decision-making function in many of the undertakings reviewed in the intervening period. Nevertheless, he argued that the fundamental business purpose of the respondent, in servicing its customers with a daily newspaper, has remained unchanged. In this regard, Judge Gold's perception of the definition of a manager in *The Montreal Star* case (supra) holds true today, just as it did in 1963 when the Board ruled that the responsibilities of the DSR were managerial for purposes of section 1(3)(b) of the Act. He argued quite forcefully that the *Globe and Mail* has arranged its affairs in accordance with the Board's past pronouncements and that we ought not, unless clearly persuaded to the contrary, upset those pronouncements thereby causing dislocation in the operation by the respondent of its circulation department. In counsel's view, much of what the applicant was proposing would require a legislative amendment similar to the enactments adopted by other Canadian jurisdictions and for which case authority was irrelevantly submitted. Counsel submits that the changes effected in the Spring of 1975 were introduced with a view to freeing the district service representative from his more routine pedestrian duties so that he could emphasize the more significant responsibilities in servicing and promoting the respondent's newspaper.

10. Counsel's efforts during the course of the inquiry reflected concerns that revolved on the periphery of the main issue of determining whether the functions of the DSR fell within the framework of the exercise of a managerial function. In the one instance, counsel for the respondent argued that the onus of proof rested upon the applicant to establish in the face of the intervening years that a change (whether in fact or law or both) has occurred justifying the conclusion it urges us to adopt. Counsel for the trade union argues that the presumption of employee status should prevail having regard to the remedial nature of the legislation in according employees representative rights. It therefore falls upon the employer to establish the managerial nature of the duties of the district service representative. (See: *The Ajax Pickering General Hospital* case, [1970] OLRB Rep. Feb. 1283 at p.1286.) The Board, in resolving this issue, notes that the ultimate outcome of this case hinges upon the soundness of the applicant's assertion of "a change" in duties and responsibilities since 1963. We do not view the instant application as a fresh situation where the presumption of employee status ought to prevail. The Board's past decisions represent "weighty" authority with respect to the DSR's employment status that we agree ought not to be undermined in a superficial fashion. In this context, the Board adopts the respondent's concerns that we should not undermine the wisdom of the past without sufficient cause. (See, for example, the recent decision of the *Chrysler Canada Limited* case, [1976] OLRB Rep. Aug. 396, where "foremen" were determined to exercise managerial functions, notwithstanding the suggestion of a change in duties and responsibilities in the context of the Board's prevailing perceptions of a managerial function.) In short, through the years we can perceive that a usage has developed within the particular framework of the organizational structure of the respondent's circulation department that ought not to be tampered with unless the evidence clearly justifies it. (See: Reed, G.W., *White Collar Bargaining Units Under the Ontario Labour Relations Act* (1969) Queen's University Printer at p.135.) In this context, the Board is conscious that several collective agreements have been negotiated since 1963 on behalf of employees engaged in the respondent's circulation department where the exclusion of the DSR from the agreement's scope has not been questioned. As a result, we are of the opinion that the applicant ought to be put to the test of showing cause as to why we ought to depart from our past findings of treating the DSR as a managerial person. In doing so, we note that notwithstanding counsel's submissions with respect to the presumption of employee status, he nonetheless in the presentation of the applicant's case adduced evidence and made argument in such a way that clearly reflected, from a practical perspective, that the onus indeed was upon the applicant to establish the non-managerial nature of the DSR's duties and responsibilities.

11. Before leaving this phase of the case, the Board is indeed quite concerned that we ought to preserve the stability of the collective bargaining relationship established by the parties through the years as a result of a Board certificate. Nonetheless, it does not follow that any Board decision made in the past is "carved in stone" and is thereby rendered immune from review. Should the merits of this case with respect to issues raised herein fall in favour of the applicant trade union, the respondent employer may simply be required (subject to its rights of review) to make whatever adjustments are necessary to accommodate our pronouncements. In other words, the decisions of this Board as they are amended or varied from time to time must take precedence over the parochial concerns of a constituent party notwithstanding the inconvenience that may result.

12. Counsel for the applicant trade union urged the Board to reverse the posture assumed in our past decisions with respect to the principle that the managerial function may

comprehend supervision of persons other than employees of the manager's employer. The underlying rationale forming the basis of counsel's submission is the utter absence of a conflict of interest that forms the basis for the legislative exclusion of persons exercising managerial functions (see *The York University* case, [1975] OLRB Rep. Dec. 945, at p.946). In the situation before us the parties are agreed that the DSR, in the performance of his duties, exercises supervisory responsibilities over the respondent's carrier force composed of a group of students who, by admission, are non-employees. It is therefore argued that the anticipated dilemma created by placing the managerial person in the bargaining unit thereby precipitating the conflict of loyalties between his colleagues in the bargaining unit and the discharge of his duties to the employer is an irrelevant concern. Counsel, in making these submissions, failed to demonstrate, on the basis of any novel approach, as to why we ought to depart from our past rulings, save to the extent of suggesting that those rulings were "wrong". They were merely wrong in the sense that the Board failed to properly address itself to the American jurisprudence heretofore relied upon in making its pronouncements. Alternatively, counsel argued that in the event we did not adopt his submission, he urged us to treat the factor of "the non-conflict relationship" as one of diminishing importance in measuring the urgency of denying the DSR representative rights. In this regard, however, we note that the Board, in the 1963 decision in having regard to the evidence, resolved to exclude the DSR from the circulation department unit irrespective of whether the carrier force were employees or non-employees. (See: *The Globe and Mail Limited* case (supra) at p.1199.)

13. In reply, counsel for the respondent argued that the only issue before the Board is whether the DSR exercises managerial functions. The term "managerial" in the dictionary sense is not so exotic in meaning that the Board ought to be impeded by "conflict of interest" concerns in making a factual determination. The Board, in this context, has been correct in the past in determining that a managerial function may comprehend the supervision of non-employees of management. This posture is supported by reference to the definition cited by Judge Gold in *The Montreal Star* case (supra) at p.8:

"What distinguishes a manager from a simple employee? Generally speaking, *it is the direction or control of the business, or a portion of it, that the manager exercises.* In fact, a manager may be a manager without any employees under him at all, for *he may direct and control a department or an operation or a phase of the business* by dealing directly with persons other than employees of his employer."

(emphasis added by the author)

It therefore follows that the existence or the demonstration of the existence of a conflict-choice dilemma with respect to whether a disputed person ought to be excluded from the operation of the Act because of the exercise of managerial functions is not a dispositive feature in resolving the question. To suggest otherwise is to compromise the plain meaning of the word "managerial".

14. There is no question in our view that "the conflict theory" forms the predominant rationale justifying the deprivation of persons who are otherwise employees but for their responsibilities as managers of the benefits of collective bargaining. In the past we have stated that "the very spirit of the legislation and the cases before the Board that have invoked that spirit resulted because of a potential for a conflict of interest with respect to certain issues of

collective bargaining. (See: *The Hydro-Electric Power Commission of Ontario* case [1971] OLRB Rep. Aug. 501.) And, consistent with this posture, the scheme of the Labour Relations Act in excluding the managerial person from the bargaining unit is safeguarding the arms-length nature of the collective bargaining relationship thereby removing any incidence for compromise. (See: *The Chrysler Canada Limited* case, [1976] OLRB Rep. Aug. 396 at p.399.) The difficulties incurred by the Board in pinpointing the parameters of the decision-making process where the conflict arises have been exacerbated by our experiences in disposing of representative applications involving large, complex, bureaucratic organizations where the decision-making process is diffused amongst various sectors of these organizational structures. The measure of independent discretion is often in direct proportion to the meaningful input of the individual in contributing to the policy-making function. (See: *The McIntyre Porcupine Mines Limited* case (supra) at p.289 for a more extensive elaboration.) Recently, the Board reviewed the dilemma of discerning the area of managerial decision-making by observing that in the qualitative sense, the measuring of managerial authority of the first-line supervisor over the employees for whom responsibility has been delegated is a relatively simpler task than measuring the contributions of individuals in the policy-making processes of a large bureaucratic undertaking. In the former instance, the indicia of hiring, firing, promoting, demoting, recommendation of pay increases, etc., etc. are relatively susceptible to discernment. On the other hand, perceiving the locus of decision-making authority in formulating policy having regard to the sophisticated processes of analysis and research adopted by these same enterprises with respect to the determinations effected by the first-line supervisors, is a more difficult task. Consequently, the more removed the policy-making functions are shown to be from actually affecting bargaining unit employees, the more difficult is the task of drawing the precise lines of conflict that may arise. In such instances the case for managerial exclusion may very well fall short of being justified. (See, for example, *The Inglis Ltd.* case, [1976] OLRB Rep. June 270 at pp. 271-2.)

15. The Board does not find any contradiction between Judge Gold's definition of a "manager" and the underlying theory of a conflict of interest justifying the deprivation of those managers of bargaining rights under the Act. Can it be seriously argued that a person who is found "to be directing or controlling an operation or a phase of the business" is not in a conflict-choice dilemma in the discharge of his duties to the employer if he is extended representative rights? In our view, the essence of the manager is the undivided loyalty owed his principal in making a contribution to the achievement of its business objectives. In the event bargaining rights were to be extended the manager, his effectiveness would surely be compromised if, for example, in the exercise of those rights he were to have recourse in concert with his colleagues to a work stoppage. The Board has heretofore noted that the DSR at one time (in 1963) was viewed by the respondent as an independent contractor. He has since been converted to an employee who has, nonetheless, allegedly continued to exercise managerial functions. The very nature of being an independent businessman is the control he exercises with respect to his financial destiny. Notwithstanding this independent status, he at all material times remained responsible in the discharge of his managerial duties to the dictates of the branch manager who is responsible for implementing the respondent's circulation policy. Is the branch manager any more or less managerial with respect to the effectiveness of discharging his duties and responsibilities vis-a-vis the DSR because of the latter's conversion to the status of an employee? And in this regard, the applicant trade union has conceded that the branch manager to whom the DSR is directly responsible exercises managerial functions under section 1(3)(b) of the Act. If the carrier boy at some future date is converted to an employee, is the nature of the DSR's supervisory responsibilities any

less affected by virtue of the conversion? The essence of the conflict rationale in excluding managerial persons from the purview of the Act is the impact of according the manager bargaining rights on his effectiveness in discharging his duties and responsibilities to the respondent employer. The fact that he may be included in a bargaining unit with other employees, although an important consideration, is not dispositive of the existence of a conflict of interest in the performance of his job responsibilities. In the last analysis, the demonstration of the conflict-choice dilemma turns on the independence of the judgment exercised in the operation of the respondent's business for which responsibility has been delegated. And the incidental repercussions of those decision-making functions to the extent they may affect employees as well as non-employees are determinative of the justification for the manager's exclusion from the operation of the Act. In our view, in the case before the Board, the difficulties lie not in defining the parameters of the exercise of the DSR's supervisory authority, but rather in demonstrating how the exercise of that authority creates a conflict mitigating his effectiveness as an alleged manager. And in this context, the Board is satisfied that that particular factor may very well affect the continued legitimacy of depriving the DSR of representative rights.

16. Counsel's paramount argument submitted in support of convincing us to rule that the DSR is not a managerial person is the impact of "the change of the law" since our determination in 1963. In support of this proposition, the Board was referred to the chronological evolution of the Board's jurisprudence as well as the jurisprudence of the British Columbia Labour Relations Board and the Canada Labour Relations Board with respect to defining the parameters of "the law" as of the date of the filing of the instant application. In the main, counsel for both parties referred the Board to the position advanced in *The McIntyre Porcupine Ltd.* case (supra) with respect to the state of the present law. The Board at the outset wishes to make our position on "the state of the present law" quite clear and unambiguous. We are categorically of the view that the Legislature, in incorporating the language of section 1(3)(b) as part of *The Labour Relations Act*, has delegated to the Board the unfettered discretion of determining, "in our opinion", the component features of the exercise of a managerial function. (See: *Bradley v. Canadian General Electric Co. Ltd. et al*, 57 CLLC ¶15,318 (C.A.) at p.697.) The Board is satisfied that the word "managerial" is sufficiently flexible and amorphous in meaning to infer that it was the natural and plain intention of the Legislature, in conferring upon the Board such a wide discretion, to develop through experience criteria necessary to resolve the managerial dilemma having regard to the particular circumstances at any given time before us. Moreover, in adopting this posture, we are also clothed with the discretion to borrow criteria established in other jurisdictions in resolving the managerial question. We are of the view that it is only when the statute law (and the case law interpretive of the statute) is shown to be inconsistent with the broad and flexible wording of section 1(3)(b) of *The Labour Relations Act* that the Board ought to be restricted in applying criteria from other jurisdictions to a particular circumstance before the Board. (See, for example, the application of the *expressio unius est exclusio alterius* maxim in *The McIntyre Porcupine Ltd.* case (supra) at p.306 thereby precluding the Board from adopting by analogy the provisions of the *Canada Labour Code*, R.S.C. 1970, c. L-1, ss. 57, 58 with respect to declaring as appropriate separate bargaining units for supervisory employees.) In all other respects, the Board does not hold that we ought to be fettered in adopting criteria from whatever the source that may contribute to the discernment and understanding of problems inherent in resolving the managerial dilemma.

17. The Board, notwithstanding the nature of our broad discretion; is somewhat dubious of counsel's use of phrase, "a change in the law", as reflecting the state of our present approach to resolving the managerial question. A change in the law in the sense that there is justification for a radical departure from the considerations of the past has not occurred. What has transpired since the Board's past determination in 1963 is an evolving approach to different factual circumstances, the results of which have precipitated the distillation of more precise and illuminating criteria. The criteria applied and developed by the Board, such as "the primarily engaged test", "the meaningful recommendation test", "the autonomous and independent exercise of discretion test", are only intended to be guidelines which, when applied to a particular factual situation, may elucidate the problem and thereby facilitate its resolve. There are no intrinsic truths to these tests that may in any empirical sense be mechanically applied *as law* with a view to resolving an issue. They only assume importance in the context of the factual situation before the Board. In other words, the tests applied and adopted by this Board are not laws but are indicia that only assume relevance when placed in a factual context. The Board therefore does not agree from this perspective that there has been a change in the law in the sense that the considerations of the past have become irrelevant or ineffectual. Rather, the Board is of the view that the approaches developed through our experience and the experiences of other jurisdictions may be of some help in resolving managerial questions in the context of particular factual difficulties. And it is in this context that it must be demonstrated that the criteria, as developed by the Board, is indeed relevant to the disposition of the managerial question.

18. In the 1963 decision, the determinative test cited by the Board in resolving the dilemma of the DSR was whether *There was room for the exercise of independent judgment* with respect to the discharge of his supervisory duties over the carrier force. In this regard, the Board was satisfied "that they have complete control and direction over the carrier force under their charge". In our view, that particular test, although stripped of adornment, is just as pragmatic and sound an approach today as it has been in the past. The Board in that decision went on to find that it was true that some of the DSR's work with the carrier force "assumed a routine and administrative character". In describing these routine and administrative duties, the Board noted "the contract signed by the carrier and the instructions issued to carriers... are prescribed by the respondent". Moreover, "the weekly reports and collections fall into the same category". But in resolving that the DSR exercised independent judgment, the Board was influenced by his responsibility in the selection, training and supervision of the carrier force. In this context "they are solely responsible for training and instructing the boys and for ensuring the day-to-day fulfilment of obligations under the contract, including timely and proper delivery, collections and a most important task canvassing for new business". Having concluded that "the respondent looks to the city and district representative...for the efficient and successful operation of the carrier force" the Board conceded that, but for its posture of treating the DSR as a group, some of the individuals perhaps would not have been viewed as exercising managerial functions. Indeed, the jurisprudential theme, as reflected in the chronological evolution of the employment status of the DSR, has demonstrated the fine line that has been drawn determinative of his exclusion from participation under *The Labour Relations Act*.

19. The principal issue before this Board is whether the alternative assertion of the applicant of a substantial change in the DSR's duties has transpired in the intervening period to justify a different ruling. Has the independent judgment found to have been exercised by the DSR in the past in directing and controlling the respondent's carrier force been

usurped as a result of admitted changes in the practice and procedure in the circulation department? There is no dispute that in the Spring of 1975, following the respondent's decision to appoint a new publisher, a more efficient program for promoting the newspaper and servicing the respondent's subscribers ensued. In this context, however, the Board notes that little change from the past transpired with respect to the routine and administrative duties performed by the DSR. That is to say, with respect to the negotiation of contracts, the monitoring of collections and the requirements for reports little room for the exercise of independent judgment continues. The Board also finds that in the awarding of bonuses, the DSR is confined to strict guidelines for which little discretion is allowed. In the continuous bonus, the objective is to permit the carrier to achieve parity with other carriers in weekly compensation having regard to the complexity of his route. In "the one shot bonus" we find that a token amount is awarded in the event the carrier is required to supplement the delivery of papers outside of his route. Should the amount awarded be deemed excessive, the DSR would be subject to censure by his supervisor. In the selection and termination of carrier personnel, the evidence indicates that the DSR is extended a like discretion as exercised in the past. Although the qualifications for likely candidates are prescribed in a detailed fashion, the DSR, in being the instrument of engaging the carrier force, is responsible for canvassing the schools and interviewing teachers with a view to securing prospects. Indeed, a list of candidates for openings in the carrier force is a requirement of the DSR's job. In the same manner, the DSR, in the event a carrier demonstrates that he is losing interest or is becoming inattentive with respect to his duties, is responsible for securing a quit. The evidence nonetheless establishes that the more frequent experience is for the student to voluntarily quit without any persuasion from the DSR. It is very rare that the DSR would be involved in the discharge of a carrier boy. Indeed, in the one instance of a termination recited in the Labour Relations Officer's report, the termination was subject to review by the DSR's supervisor. In the case of expanding, contracting or otherwise altering the routes of the carrier boy, the DSR exercises independent judgment within his particular district. He is expressly restricted, however, from making incursions into geographic areas outside his district. The DSR continues to be responsible for training the carrier boy in the instruction of how and where to deliver the newspapers, the manner of making collections and his general deportment with the customer. Nevertheless, these instructions are supplemented by pamphlets emanating from the central office that arrive along with the carrier's newspapers. In most of these matters, the Board is quite satisfied that the DSR, to the extent he remains within defined parameters, exercises supervision over the carrier force (inclusive of the unit men).

20. The DSR's principal responsibility in contextual perspective to his supervisory duties over the carrier is to promote the respondent's newspaper through increased circulation and the maintenance of present subscribers by providing good service. The Board has heretofore addressed itself to the substantial changes adopted in the Spring of 1975 to cure the shortcomings in the service extended the respondent's customers. In June, 1975, this programme culminated in a seminar at York University convened by the respondent with each of its DSRs in attendance. Mr. Marskell, the respondent's associate circulation manager, was charged with the responsibility of taking the necessary measures to implement the respondent's new program. He described the situation with respect to the shortcomings in customer service as follows:

"Well, again, being in the field in January and February, I mentioned the District staff came in pretty much when they wanted, they went to a desk, they sat down behind a desk, the secretary would feed calls to them. Well,

very frankly, what they did with the call was *at their discretion*, and I should also point out that, at this point in time, we were receiving phenomenal -- and I use the word to its full intent -- numbers of letters from subscribers who repeatedly said that: Mr. Publisher or whoever they were writing to. "I have contacted your office four times; I have been assured that this matter will be looked after, etc., etc.". And the point was that the problems were not acted on by the District Staff; they were forgotten. When a paper such as what we call the Missed-and-Wants, a customer'd call and say, "my carrier didn't deliver the paper today; I would like a copy," the District staff would then talk the person out of it, and, in effect, the customer would be told "You'll get the paper when we want to bring you the paper." And so we set it up that the District staff would be in the field where they could service the customers and deal with the carriers..."

(emphasis added)

21. The change in policy was reflected in numerous memoranda (marked as Exhibits 1a to p) addressed to the branch managers, under Mr. Marskell's signature, explaining the respondent's new policies in servicing customers. In context of these policy statements we are of the firm opinion that the DSR's independent judgment was substantially reduced. In this regard, the Board rejects any suggestions as advanced by the respondent that these policies were merely "guidelines", preserving the DSR's flexibility of independent decision making. On the contrary, the memoranda are couched in language that indicate adverse repercussions would follow in the event of a failure to implement the policies. For example, in Mr. Marskell's memorandum (1d) "on missed and wants" he indicates: "If a 'missed and wants' is the supervisor's instruction, then the district representative *has no leeway* on whether a paper is to be delivered". Moreover, in describing the supervisor's session with the DSR in monitoring complaints (1e) Mr. Marskell writes: "This session is all-important and is a must...". And with respect to dealing with requests for clarification of the new policy, Mr. Marskell indicates: "Some of the supervisors and clerical staff have specifically asked for *a firm policy statement* on our post-dated file...". In light of the measures adopted by the respondent to improve its customer service relations, we find that the responsibility of the DSR has been diminished and proportionately shifted to the shoulders of the branch manager who has overall authority to implement and execute the new program. In this regard we view "the directives" issued the DSR to have displaced his autonomy with respect to his supervisory responsibilities over the carrier force to mechanical and predictable functions. The DSR as a result is required to program his daily routine within the framework intended by these directives. Failure to adhere to the respondent's scheme of organizing its uniform policy of satisfying customer complaints is shown to have dire consequences on the DSR's employment tenure. We perceive that in this light, his conversion from an independent businessman (as viewed by the respondent in 1963) to an employee (in the common law sense) at the material time of the filing of this application assumes a more meaningful reflection of his duties and responsibilities when measured in context of his capacity to assume "complete and direct control over the carrier force". The Board finds that for the very legitimate reasons described by Mr. Marskell in the Labour Relations Officer's report, the formula adopted by the respondent for dealing with customer complaints necessitated the restructuring and reduction of the DSR's authority. And the incidental result of the DSR's discretion over the carrier force has been displaced to the extent that he can no longer be construed as having complete or sole control over their activities. Indeed, the respondent no longer looks to the DSR "for the efficient and successful operation of its carrier force".

22. This position is clearly demonstrated with respect to the DSR's role in promotions. By memorandum dated June 11, 1975 (Exhibit 1p), Mr. Marskell outlines the respondent's "home delivery promotion policy" and the role of the DSR in implementing that policy. The policy paper is prefaced by the statement "and this will act as a permanent guideline". Promotional efforts are described imperatively in the sense that they "will be divided into specific groups":

- (a) Wednesday night weekly meetings;
- (b) one man/one boy/one route;
- (c) small route samplings.

Each Wednesday night the DSR is responsible for convening the meeting and informing the carrier boy of the canvassing procedure. In this sense, the DSR is responsible for training the carrier. Although the function of training the carrier is integral to this particular aspect of the promotional activity, we do not find the teaching process necessarily dispositive of the exercise of managerial function. (See: *The Essex Health Association* case (1970) OLRB Rep. Nov. 1970.) In the training process, the DSR is merely executing the directions dictated by Mr. Marskell's policy statement. In a like manner, "the one man/one boy/one route" promotion dictates that "the supervisor will be responsible for the development of this particular routine". The DSR must hire, train and organize the professional canvasser in implementing the promotion. Canvassers are hired as a result of ads put in the paper requesting their services. The significant role assumed by the DSR "to ensure that the program is a success" is his responsibility "for canvassing with the professional canvasser on the first evening involved". In short, the DSR is essentially engaged as "a teacher", instructing both the carrier and the professional canvasser in the methods of salesmanship in the promotion of the Globe and Mail in accordance with the manuals and directives distributed by Mr. Marskell. Finally, in the program for small route samplings, Ms. Lorraine Chenier (located at the respondent's central office) is ultimately responsible for its development. Indeed, the branch manager is expressly proscribed from sponsoring this particular phase of the promotion policy. Moreover, the nature of the branch supervisor's and the district service representative's participation is to work with Ms. Chenier in developing the program. And, indeed, Mr. White's statements made in the Labour Relations Officer's report must be viewed in context with Ms. Chenier's responsibilities when he describes the efforts made by DSRs to promote circulation through samplings of the newspaper.

23. What is important to the Board in determining whether the DSR exercises independent initiative in promoting the circulation of the newspaper is whether he assumes responsibility in formulating sales programs that incur the financial obligation and commitment of the respondent employer. In this context the Board learned through the Labour Relations Officer's report that the one circulation program formulated by Mr. Maharaj (the lone DSR interviewed) required the imprimatur of his supervisory staff. The procedures that were necessitated in order to secure approval of the program were so involved and torturous as to render any suggestion of "effectiveness" in his decision-making powers illusory. In short, in both the context of the servicing of customer complaints and the promotion of the newspaper's circulation, the Board is of the view that the independent judgment once exercised by the DSR in supervising the carrier force has been so restricted that he can no longer be said "to completely direct and manage the carrier force". Rather, his duties, al-

though in the broadest sense remain supervisory, predominantly pertain to training and monitoring the carrier force within the strict directives prescribed by the respondent's circulation department. The DSR can no longer be viewed as being looked upon as integral to the promotion of the respondent's expectations in the discharge of his duties that necessitated the changes in the Spring of 1975. The Board therefore finds that the DSRs do not exercise managerial functions within the meaning of section 1(3)(b) of the Act and, therefore, are employees entitled to representative rights pursuant to the provisions of the Act.

24. The parties were also apart on the geographic description of the appropriate bargaining unit. The applicant requests that the unit description ought to be confined to the Municipality of Metropolitan Toronto. The respondent argues that, in accordance with the Board's 1963 decision and the subsequent collective agreements negotiated as a result thereof, we ought to describe the unit in terms of the Province of Ontario. In 1963 the Board described the bargaining unit as follows:

"all employees in the circulation department of the respondent in *The Province of Ontario*, save and except..."

25. The respondent maintains four branches within the Metropolitan Toronto area commonly referred to as its "City Division". Each branch is divided into approximately nine districts for a total of approximately thirty-seven districts. For each district there is assigned a DSR. There are approximately fifty DSRs employed within the confines of the City Division. The respondent also maintains, in adjacent municipalities, retail trading zones. Approximately ten DSRs are assigned to these trading zones and perform essentially the same duties as those performed in the City Division. There is absolutely no interchange between DSRs assigned to the City Division and those assigned to the retail trading zones.

26. The applicant argues that, in the light of the absence of interchange, and by application of the Board's standard criteria with respect to the appropriate unit, we ought to confine the bargaining unit to The Municipality of Metropolitan Toronto. (See: *The Wix Corporation* case, [1975] OLRB Rep. Aug. 637.) On the other hand, the respondent submits that it has established, through the effluxion of time, a province-wide practice with respect to the circulation department employees. If the Board were to adopt the applicant's proposal, we would be fragmenting into several geographic units what is basically a tag-end unit to the all-employee unit described in the circulation department agreement in provincial terms. (See: *The Globe and Mail Limited* case, [1975] OLRB Rep. Dec. 943.) The applicant initially proposed that the appropriate unit be described in the following terms:

"All employees of the respondent in its Circulation Department in the *Municipality of Metropolitan Toronto*, save and except the following:

Circulation Manager, City Circulation Manager, *Country Circulation* Manager, Assistant City Circulation Manager, Assistant *Country Circulation* Manager, Office Manager of the Circulation Department, Supervisor Sales Plants, Senior *Country* Supervisor, Supervisor Traffic, City Supervisors, *Country* Supervisor, Branch Managers, Supervisor Special Sales, persons exercising managerial functions equal to or superior to those described above, confidential secretaries to the Circulation Manager, the City Circulation Manager, the *Country Circulation* Manager and Office Manager of the Cir-

circulation Department, persons regularly employed for not more than 24 hours per week, and employees presently covered by collective agreement between the Toronto Newspaper Guild, Local 87, The Newspaper Guild and Globe & Mail Limited.”

Notwithstanding the protestations of counsel, it is quite clear that the applicant trade union, in essence, was proposing a tag-end unit to the bargaining unit described in the collective agreement pertaining to the circulation department employees. The applicant, nonetheless, requested that leave be granted enabling it to amend its proposed unit to reflect the unit actually desired. The Board, in assessing the parties' representations, is satisfied that the respondent's position with respect to the issue of the appropriate bargaining unit ought to prevail. In light of the distinct and successful past practice of collective bargaining on a province-wide basis with respect to the respondent's circulation department employees, we find that the parties ought to maintain that practice in dealing with the DSRs. To hold otherwise in acceding to the applicant's proposed unit, we would be endorsing a resultant fragmentation of bargaining units confined to metropolitan areas throughout the respondent's retail trading zones. Such a posture simply would not lend itself, in these particular circumstances, to meaningful collective bargaining. (See: *The Hydro-Electric Power Commission on Ontario* cases, [1973] OLRB Rep. May 231, [1973] OLRB Rep. Sept. 563.)

27. As a result of the foregoing, and having regard to the representations of the parties, the Board finds that all district sales representatives employed by the respondent in its circulation department in the Province of Ontario, save and except and persons above the rank of branch manager, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period and employees presently covered by subsisting collective agreements, constitute a unit of employees appropriate for collective bargaining.

28. For purposes of clarity, it is the Board's intention that the bargaining unit be confined to DSRs employed by the respondent in the Province. The line of managerial supervision is intended to be drawn at the branch manager level and is to comprehend employees engaged in like capacities as may be described in the existing circulation department agreement.

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0049-76-R International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employees' and Bartenders' International Union, A.F.L.-C.I.O. and C.L.C., (Applicant), v. **Seaway Hotels (Ontario) Limited**, (Respondent).

Reconsideration – Bargaining Unit – Craft Status – Whether the Board will reconsider dismissal based on conclusion that matter was dealt with by another panel upon learning that other panel did not deal with application – Whether Board will continue to recognize bartender craft in the light of changing conditions in the industry.

BEFORE: Frank V. Boscarior, Vice-Chairman, and Board Members A. Gribben and J. E. C. Robinson, Q.C.

APPEARANCES: *Dave Corbett and Joe Leithwood for the applicant; John P. Sanderson, Q.C. for the respondent.*

DECISION OF THE MAJORITY, (F.V. Boscarior and A.S. Gribben), November 15, 1976.

1. By letter dated August 25, 1976, the applicant has requested that the Board reconsider its decision in this matter dated June 14, 1976, wherein the Board had dismissed its application for certification for a proposed bargaining unit of employees consisting of "All full time and part time, male and female bartenders, tapmen, bar-boys and improvers in the employment of the respondent in the area known as The Hook and Ladder Club in the Beverly Hills Hotel, 1677 Wilson Avenue, Downsview, Ontario".
2. The relevant background to the present application is as follows: On October 25, 1975, the applicant herein in Board File No. 1142-75-R (see [1976] OLRB Rep. March, 99) had initially applied before another division of the Board for bargaining rights with respect to its regular beverage unit of employees at the respondent's hotel. That unit, upon agreement of the parties, was accordingly defined in terms of "All full time and part time tapmen, bartenders, alcoholic beverage waiters, male or female, bar boys and improvers in the employ of the respondent in Metropolitan Toronto save and except manager...". However, the Board, pursuant to paragraph #2 of its decision dated March 16, 1976, then proceeded to confine the bargaining unit to "employees engaged in the respondent's Trophy Room, Hall of Fame Room and Olympus Room as of the date the application was made". In reaching this conclusion, the Board, in paragraph #11 of the said decision, specifically excluded from that bargaining unit employees assigned to "The Hook and Ladder Club" on the basis that these particular premises were "by necessity geared primarily towards the services of food", and "that the servicing of alcohol, although integral to the business operations of the club, could not be permitted unless the servicing of food formed a primary vehicle justifying the employment of beverage room employees".
3. On April 8, 1976, the applicant filed the instant application on behalf of the bartenders assigned to "The Hook and Ladder Club" as encompassed in the proposed bargaining unit as set out in paragraph #1 herein. It was conceded by the parties during the course of the initial hearing of this matter on May 17, 1976, that the essential facts in this application had not substantially changed since the time of the Board's decision dated March 16, 1976, in Board File No. 1142-75-R. It was on the basis of the findings and conclusions as set

out in this latter decision which initially caused us to dismiss the instant application in our decision dated June 14, 1976.

4. However, the applicant subsequently applied for reconsideration of the Board's decision dated March 16, 1976, in Board File No. 1142-75-R. In dismissing that application pursuant to its decision dated August 6, 1976, the Board by way of clarification stated as follows:

"2. The Board wishes it to be perfectly clear that our decision did not address itself to whether employees engaged as bartenders in the respondent's "Hook and Ladder Club" would or would not be eligible for inclusion in the "craft unit" normally accorded the applicant in Metropolitan Toronto and the City of Oshawa."

5. In these circumstances, the Registrar was directed to list this matter for hearing on September 27, 1976, in order to enable the Board to entertain argument from the parties concerning the issue as to whether it should in these circumstances, reconsider its initial decision in this matter dated June 14, 1976. I have now had an opportunity to carefully assess the extensive representations of the parties as adduced in this regard.

6. In the *Cedarbrae Hotels and Homes Ltd. carrying on business as the Thunderbird Motor Hotel* case, [1973] OLRB Rep. January, 44, the Board specifically confirmed the craft status of the applicant, Local 280 of the Hotel and Restaurant Employees' and Bartenders' International Union, pursuant to the provisions of section 6(2) of the Act. (See also the subsequent decision of the Board in the *Orangerooft Canada Limited* case [1974] OLRB Rep. November, 761 and the cases cited therein.) It was on this basis that the Board, despite a finding of a distinctive community of interest shared with the respondent's dining room staff, nevertheless found that having regard to the mandatory provisions of the relevant legislation, it had no alternative but to find as appropriate the applicant's regular craft unit as proposed.

7. The question therefore before us resolves itself into determining whether the applicant, having qualified under the requirements of section 6(2) of the Act, is thereby entitled in this application to carve out a craft unit of bartenders despite the fact that these individuals are physically employed at a bar situated in a "dining" area (as opposed to a "beverage" area) of the respondent's premises.

8. Having carefully reviewed all of the circumstances, we must conclude that the applicant, in the absence of any statutory pre-conditions to the operation of section 6(2) of the Act, has brought itself within the mandatory provisions of this legislation such that the Board has no alternative but to find as appropriate the craft bargaining unit as proposed. In arriving at this conclusion, we are not unmindful of the continuing liberalization of provincial liquor legislation with respect to the consumption of intoxicants in dining lounges and dining rooms, and the potential jurisdictional problems affecting the applicant vis-a-vis its sister locals. (In this regard, see paragraph #6 of the decision of the Board in the *Cedarbrae Hotels and Homes Ltd. carrying on business as the Thunderbird Motor Hotel* [supra].) These are matters which the applicant must seriously take into account with respect to its future organizational activities. Be that as it may, in our opinion, the Board has no authority in this application to deprive the applicant of its craft unit simply because "The Hook and

Ladder Club" constitutes a dining lounge or dining room. Indeed, the Board's policy statement dated May 5, 1964, as issued in this regard, would appear to have specifically contemplated the inclusion of these areas.

9. Having regard to the foregoing, the Board therefore finds that all full time and part time, male and female bartenders, tapmen, bar-boys and improvers in the employment of the respondent in the area known as The Hook and Ladder Club in the Beverley Hills Hotel, 1677 Wilson Avenue, Downsview, Ontario, constitute a unit of employees of the respondent appropriate for collective bargaining.

10. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on April 15, 1976, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

11. A certificate will issue to the applicant.

CONCURRING DECISION OF A. S. GRIBBEN:

1. Having carefully reviewed the application, I concur with the Vice Chairman that, in fairness, the Board is in this case bound by its precedents.

2. Section 6(2) of the Act, is, of course, mandatory but the section only operates where the Board finds that a group of employees "exercise technical skills" or "are members of a craft by reason of which they are distinguishable from the other employees".

3. In the next application for certification for a craft unit of bartenders, I believe the Board should fully review the finding that such employees exercise such technical skills or are members of a craft such that section 6(2) applies.

4. In its decision in *Orangerooft Canada Limited*, [1974]OLRB Rep. Nov. 761, the Board reviewed the history of such applications and found that such employees do exercise skills or are members of a craft by which they are distinguishable. This decision was made by looking back on decided cases. The time has now come, I believe, to review the present circumstances in which tapmen, bartenders, beverage waiters, bar boys and improvers work.

5. New legislation and changing social attitudes have produced major changes in the entertainment industry in recent years, and this is especially true of drinking establishments. The Board's decisions regarding the applicant's craft status should not be considered to be carved in stone.

6. Such a change should be made by the Board only once the applicant has had notice that rights long ago considered to be established are again in issue and only after a full presentation of evidence and argument on point.

7. In this case the applicant had not been put on notice regarding criteria for change and I therefore concur with the vice-chairman that a certificate should issue.

DECISION OF BOARD MEMBER, J.E.C. ROBINSON, Q.C.:

1. I dissent.
 2. There was neither new evidence nor argument presented at the hearing for reconsideration of the initial decision which was not available to the applicant at the initial hearing upon which the panel unanimously dismissed the application.
 3. That being so, I would have dismissed the request for reconsideration and confirmed the original decision.
 4. To do otherwise, in my opinion, is to cause undue delay in the conclusion of cases and a proliferation of requests for reconsideration.
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0177-76-U Warehousemen and Miscellaneous Drivers, Local Union No. 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (Complainant), v. **F. W. Woolworth Co. Ltd.**, (Respondent).

Discipline for Trade Union Activity – s.56 – Whether grievor suspended for union activity or poor performance.

BEFORE: R. A. Furness, Vice-Chairman, and Board Members J. D. Bell and A. Hershkovitz.

APPEARANCES: *Guy Beaulieu appearing for the complainant; R. A. Werry, J. Petre, M. Seeley and D. Rosano appearing for the respondent.*

DECISION OF R. A. FURNESS, VICE-CHAIRMAN AND BOARD MEMBER J. D. BELL: November 17, 1976.

1. The complainant complains under section 79 of The Labour Relations Act that the respondent has dealt with William Brownlee contrary to the provisions of section 56 and 58(c) of the Act. More specifically the complainant alleges that the grievor was suspended for two weeks without pay for the sole purpose of intimidating him and other employees who are interested in exercising their rights under section 3 of the Act. The complainant requests the removal of the suspension from his record and payment for all benefits for the period of the suspension and a direction that the respondent cease and desist in its activities against the employees who desire a union.
2. The respondent denies that the grievor was dealt with either contrary to the Act or for the purpose of intimidating employees as aforesaid because of his poor timekeeping, his work habits and his poor work performance.

3. It was agreed by the parties that on April 23, 1976, the date of the grievor's suspension, and for some months prior to that date, the complainant was engaged in an organizing drive at the respondent's warehouse in Weston.

4. The grievor commenced working for the company in September, 1971, and he is still employed by the respondent. He works for the respondent in its warehouse in Weston. The evidence establishes that the grievor was late reporting for work on many occasions. More specifically he was late on seventeen occasions during the first three months of 1976.

5. The respondent's personnel manager, John Petre, verbally warned the grievor of his poor time keeping on December 30, 1975 and on January 9, 1976. On the former occasion Mr. Petre warned the grievor that he would have to come to work on time. On the latter occasion Mr. Petre warned Mr. Brownlee that he would have to report to work on time or the respondent would have to do something about it. On neither of these two occasions did the grievor offer any explanation or make any comment about his timekeeping.

6. From December 1975 onwards the grievor's time-keeping was extremely poor. In December of 1975 he reported late for work on nine occasions (almost half of the working days in December of 1975). In January of 1976 he reported late for work on six occasions and in February of 1976 he reported late for work on three occasions. The grievor's timekeeping in March of 1976 was almost as bad as it was in December of 1975 – in March of 1976 he reported late for work on eight occasions.

7. Mr. Brownlee was twenty-eight minutes late reporting for work on February 6, 1976, and on that date he received a written warning from Mr. Petre. The reason given on the warning was poor timekeeping. The grievor signed this warning. On April 8, 1976, the grievor was seven minutes late reporting for work and he received a final written warning from Mr. Petre. The reason given on the warning was "poor time keeping – spending too much time in smoke rooms". On this occasion the grievor refused to sign the final warning.

8. On April 8, 1976, Mr. Petre gave the following signed statement to the grievor:

"Mr. William Brownlee,
124 Chalk Farm Dr.
Downsview, Ont.

Dear Mr. Brownlee,

The established and published Company rules state that "all employees shall be at their assigned work stations, ready to perform their assigned duties, at the regular starting time". On December 30, 1975, you were given a verbal warning by me stating that unless you reported to work on time, you would be subject to further disciplinary action. On January 9, 1976 you were given a second verbal warning. I explained the numerous reasons for requiring our employees to be at work on time.

On February 6, 1976 your signature was given on a Written Warning Notice for failing to report to work on time in accordance with Company rules. This disciplinary action was taken because you had been tardy twenty-one (21)

times from September 28, 1975 to February 6, 1976. I warned you at that time you signed the Notice that failure to correct your record by reporting regularly and on time would make you subject to further disciplinary action.

Since February 6, 1976 your record shows that you were late on the following days:

February 12 Thursday	March 18 Thursday
February 13 Friday	March 19 Friday
March 2 Tuesday	March 23 Tuesday
March 3 Wednesday	March 31 Wednesday
March 4 Thursday	April 8 Thursday
March 5 Friday	

On each of these dates, you reported for work late and did not give me any reason that could be accepted as a reasonable excuse. Your continual tardiness has placed an added burden on your fellow workers who respect their responsibilities and report for work on time.

You have also been warned regarding the time spent in the smoke room and other times not on the job on the following dates:

January 28/76 – Mr. P. Payne – foreman

February 4/76 – Mr. George Medland – Dept. Head

March 3/76 – Mr. George Medland – Dept. Head

March 25/76 – Mr. Eamon Duffy – Dept. Head

March 31/76 – Mr. Eamon Duffy – Dept. Head

April 1/76 – Mr. Eamon Duffy – Dept. Head

April 5/76 – Mr. Eamon Duffy – Dept. Head

Since you have not heeded my previous warnings to correct your attendance record and fully meet the responsibilities of your position, and by refusing to sign the final warning on a Written Warning Notice on April 8, 1976, I am presenting you this Written Warning Notice.

You are expected to correct your tardiness by reporting regularly on time. You are expected to abide with established and published Company rules or you will subject yourself to further disciplinary action up to and including termination.

Sincerely,
(Sgd.) J. S. PETRE
Personnel Manager"

9. On April 23, 1976, Mr. Petre suspended Mr. Brownlee for two weeks following a series of written reports from the respondent's supervisory staff concerning his conduct during working hours.

10. These written reports to Mr. Petre commenced on January 28, 1976, and extend to April 23, 1976. On January 28, 1976 Paul Payne, the respondent's foreman in the Regular Orders' Department, complained that the grievor had picked up an order at 11:45 and had finished it at 2:50, had failed to check on quantity of merchandise before having a stockman obtain it and had spent ten minutes in the washroom for a cigarette and that he had had to tell him to come out of the washroom. On February 4, 1976, George Medland, the head of the respondent's Order Filling, complained that Mr. Brownlee was working in the bin area and was found in the rack area waiting for the 11:45 a.m. break. On March 3, 1976, Mr. Medland complained that the grievor was spending too much time in the washroom and that he had checked him for ten minutes on that date.

11. Mr. Eamon Duffy, one of the respondent's Department Heads, made several written complaints about Mr. Brownlee in one report which Mr. Petre received on April 5, 1976. This report states:

March 25/76 – Spending to (sic) much time in washroom – 15 mins.
 March 31/76 – same.
 April 1/76 – Late returning from job after first break. 12 mins.
 April 5/76 – Checked time in washroom 16 mins.
 Warned verbally on all occasions.

12. In a written report about the grievor dated April 7, Mr. Duffy wrote:

April 7th – spending to (sic) much time in washroom – 12 mins. afternoon
 Finished picking an order 1:45
 Picked next order up just as bell was sounding for 2:15 break. This means one half hour was wasted.

13. In a written report about the grievor dated April 13 and 14, 1976, Mr. Bill Daly, one of the respondent's foremen, stated:

I mentioned to the above employee of spending to (sic) much time in the washroom on each of the above dates his time there was 17, seventeen minutes and 15, fifteen minutes he gave me know (sic) answer as to all this time away from his job.

14. On April 21, 1976, Mr. Petre received the following written report from Mr. Duffy:

FINAL REPORT W. BROWNLEE

April 21/76

I feel the above employee should be dismissed today for his very poor performance. His new thing standing around with his hands in his pockets – this takes up at least 1 hr. One Hour – per – day. He also keeps leaving his job and keeping several other men from doing there (sic) work. I have spoken to him on the above subjects – his answer as

always so what: I feel we shall be much better of (sic) without his presents (sic).

On April 23, 1976, Mr. Petre received a further written report from Mr. Duffy which stated:

April 23/76

W. BROWNLEE

I wrote a final report on the above employee on April 21, 1976 for a very poor work performance. In the past few days he has done less work and still keeping other men from doing there (sic) work. For the very little work he does he keeps one hand in his pocket and one eye on me. In my judgement this is very bad work habit. In my last report I asked that this man be dismissed. I believe that this should still be so.

15. There are two theories surrounding this complaint. The complaint advances the view that the respondent "set up" and suspended Mr. Brownlee because of his support for the complainant's organizational campaign and to serve as a warning to other supporters of the complainant. The respondent takes the position that Mr. Brownlee was trying to goad it into taking action against him in order to promote the complainant's campaign to organize its employees. The respondent points to five earlier complaints against it under section 79 of The Labour Relations Act which were dismissed on March 16, 1976 (see File Nos. 1281-75-U, 1292-75-U, 1293-75-U, 1294-75-U, and 1334-75-U) and advances its theory that the conduct of Mr. Brownlee was designed to provoke it and produce a situation where the complainant might once again file a complaint under section 79. The respondent's position is that the conduct of Mr. Brownlee placed it on the horns of a dilemma. The respondent felt compelled to take action against Mr. Brownlee but was reluctant to do so because of the background of the complainant's organizational campaign and the shadow of the five earlier complaints under section 79. Mr. Petre testified that ultimately the grievor was suspended for two weeks and that had it been anyone else a dismissal rather than a suspension would have been the response from the respondent.

16. The grievor's record as an employee came under close scrutiny in this complaint. The general view of his superiors was that he was a marginal employee and at best an average employee. His fellow employees who gave evidence before the Board regarded him as a worker who was no worse than anyone else. However, the grievor was commonly referred to around the respondent's warehouse as "the late Mr. Brownlee". There is no dispute about the incidence of his lateness in reporting to work. The issue arises over Mr. Brownlee's behaviour within the warehouse. In this context there is also the question of whether the respondent, through its supervisory staff, made a special point of observing the grievor and, if so, the reason for such behaviour.

17. Smoking is not permitted within the respondent's warehouse because of a fire hazard. However, a room is set aside for smoking and it appears that smoking is permitted within the washroom. The employees in the warehouse have been given two smoking breaks of five minutes each – one in the morning and one in the afternoon. The evidence established that many of the respondent's employees on occasions exceeded the five minutes and

that when the supervisors were aware of this they warned the employees about abuses of the smoking break. Mr. Brownlee was frequently timed on his smoking breaks and visits to the washroom because his supervisors had noted that he was regularly exceeding reasonable time limits for the smoking room and the washroom by substantial margins. There was no evidence before the Board which challenged the timing of the grievor by his supervisors. We therefore completely accept the evidence regarding Mr. Brownlee's periods in the smoking room and the washroom. We also find that because of his conduct the respondent's supervisors felt compelled to make a special point of observing Mr. Brownlee. There was also evidence about the number of lines picked by the respondent's employees. This is a measure of each employee's productivity over various intervals of time. After making due allowance for the averaging of difficult and lengthy orders, the easy or "cream" orders and the orders for Woolworth's stores as opposed to Woolco Stores we find that the grievor's productivity was below average and below what the respondent reasonably had a right to expect.

18. The respondent had knowledge of the grievor's support for the complainant at least as early as January 13, 1976, when a leaflet was placed on the windshields of cars in the respondent's parking lot. Such leaflets bore the names of the grievor and Ewing Bell who were styled as "new members of the Union organizing committee". It is also established that the respondent knew the names of several other supporters of the complainant including:

Sonny Pabla
Greg Cortese
Joe Cortese
Ross Harding
Jerry Gagner
and Garry Armstrong

We shall refer to these persons subsequently.

19. The complainant made much of the respondent's conduct in transferring employees from one section to another and the frequency of such transfers. In cross-examination, Mr. Brownlee gave evidence that when he was hired he was informed by the respondent's Mr. Seeley that he was being hired as a warehouseman and that he would be moved to various jobs to begin with and that he would then stick to one job more or less. The evidence before the Board revealed that many of the respondent's employees were transferred from time to time for varying periods. The complainant regarded the transfer of the grievor and Mr. Ewing Bell, another supporter of the complainant, as being somewhat sinister and as intended to enable the respondent to maintain a greater degree of surveillance on the transferees and to intimidate by example actual and potential supporters of the complainant.

20. We note that the rates of pay for each employees who was transferred remained the same and there was no evidence to indicate any change in the nature of their work or the hours of work. It is true that Mr. Brownlee and Mr. Bell were transferred immediately after the pamphlet was placed on the windshields of the cars in the respondent's parking lot. While Mr. Bell was not transferred again, Mr. Brownlee subsequently was transferred again. No specific explanation was offered for their transfers other than a general explanation that such transfers occurred from time to time. In all of the circumstances we find that the transfers of the grievor are not fairly attributable to any alleged anti-union sentiments of the respondent.

21. These circumstances involved an analysis of the transfers of employees who apparently had not exhibited any preference either for or against the complainant. The supporters of the complainant who were known to the respondent were each treated in very different ways. Mr. Bell was transferred once and did not complain about the transfer. Messrs. Armstrong, Pabla and Greg Cortese have not been transferred at all. Mr. Harding has been moved once at his own request. Messrs. Joe Cortese and Gagner have been transferred once and it is not clear whether or not either of them requested the transfer.

22. Questions of credibility were raised in assessing the evidence of all of the witnesses. In areas of conflict between the testimony of the supervisory personnel of the respondent and the grievor we accept the evidence of the former in preference to the latter having regard to their demeanour in giving evidence. With respect to the other witnesses called by the complainant we note that their impressions of the grievor were based upon occasional contact with him during his work whereas the supervisors were in a position to observe his work constantly.

23. The complainant's organizational campaign appears to have commenced during November of 1975. Many of the respondent's employees entertain strong views either in support of the complainant or in opposition to it. The respondent's supervisory personnel have not hesitated to express themselves on the complainant and trade unions generally when asked for their views. Leaflets have been distributed by the respondent's employees both in favour of the complainant and against it. The grievor has his supporters and his opponents within the respondent's warehouse. One of the respondent's office employees has been beaten up and the respondent has issued a writ in the Supreme Court and claims damages for libel and slander and conspiracy against Ewing Bell and William Brownlee. Such is the background to this complaint against the respondent.

24. This complaint focuses on the question of whether an employer may discipline an employee who is known to be a supporter or organizer of a trade union. In our view the answer is in the affirmative where it can be clearly shown that the discipline is related solely to considerations other than the employee's support for a trade union. In our view there is evidence before the Board which clearly establishes that Mr. Brownlee was disciplined by the respondent because of his poor timekeeping, his work habits and his work performance. He was treated differently from other employees except to the extent that his timekeeping, work habits and work performance required his supervisors to take some action and respond to his conduct. There is every indication in the evidence that the supervisors behaved reasonably. When one of the complainant's organizers reported for work in an impaired condition, he was, according to the respondent's well established rules, subject to instant dismissal. It appears that this would have happened but for the personal intervention of Mr. Duffy. This employee retained his job with the respondent.

25. We reject as untenable the theory of the respondent's conduct as advanced by the complainant. It is not necessary for us to decide whether the respondent's theory of this complaint is correct. However, there are some points of evidence which support the respondent's views. Firstly, the using of Mr. Petre's table in the lunchroom by the grievor and other supporters of the complainant for about a week during March was, in our opinion, designed to provoke him into a response against the complainant's supporters. Mr. Brownlee described this action of sitting at Mr. Petre's table as a symbolic protest. Secondly, the grievor made a point of passing Mr. Duffy's desk on his way to and from the wash-

room although he did not have to use this route. In these circumstances, Mr. Duffy could hardly help being aware of his movements. Such conduct is a strong inducement to being timed during visits to the washroom. And thirdly, Mr. Brownlee testified that he would remain at the respondent's warehouse until the complainant is certified.

26. The respondent was aware of the fact that Mr. Brownlee was and is a supporter of the complainant. However, we find that the suspension for two weeks of Mr. Brownlee was based upon an assessment of his performance as an employee and not upon his support for the complainant.

27. Having regard to the foregoing we find that the respondent has discharged the burden of proof that it did not act contrary to The Labour Relations Act with reference to William Brownlee.

28. This complaint is dismissed.

DECISION OF BOARD MEMBER A.L. HERSHKOVITZ:

1. I dissent.

2. In reviewing the evidence I find that the respondent's decision to suspend the complainant, Mr. Brownlee, who, as admitted by all parties, was the chief organizer on behalf of the complainant union was evidence of the employer's intention to interfere with the formation of a union.

3. Mr. Brownlee never hid the fact that he was active in the organizing campaign. The matter of his being late did not become an issue until his organizing activity started, even though his record of being late was of such common knowledge that he was referred to by all as the "late Mr. Brownlee".

4. Immediately after the appearance of the organizing leaflet signed by Brownlee, a program of surveillance and job change were imposed on him. In my opinion this was evidence of intention to intimidate Brownlee and any other person who participated in the formation of the union.

5. I further fail to see where Mr. Brownlee's statement that he would remain at the respondents warehouse until the union is certified can be considered other than the grievor's sincere desire to bring about that which he, in concert with others, seek to bring about, namely the organization of a union in the respondents warehouse. This is clearly a valid position in line with his rights guaranteed under The Labour Relations Act.

6. Because of the foregoing I dissent from the decision of the majority and would grant the complainant the relief sought.

1211-75-R The Canadian Union Of Public Employees, (Applicant), v. Eastern Ontario Health Unit, (Respondent), v. Group of Employees, (Objectors).

Bargaining unit – Health Unit – Whether physiotherapists and social worker should be included with clerical and administrative support staff, health inspectors and dental hygienist – Effect of minimal community of interest – Effect of different educational and professional qualifications – Effect of including other classifications equally disparate – Effect of potential fragmentation.

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members O. Hodges and F.W. Murray.

DECISION OF THE BOARD: November 15, 1976.

2. The issue which faces the Board in this matter is the scope of an all-employee health unit. The respondent and the objectors allege that two physiotherapists and a social worker ought not to be included in the bargaining unit on the ground that they have no community of interest with other employees in the unit. The applicant argues, on the other hand, that such a community of interest exists and that these employees ought to be included in the bargaining unit.

3. The respondent employer, the Eastern Ontario Health Unit, is responsible for the public health programs in the City of Cornwall, the united counties of Prescott-Russell and the united counties of Stormont, Dundas and Glengarry. The District Medical Officer of Health is responsible to the Board of Health for the carrying out of the public health programs undertaken by the respondent. The Board of Health, which is composed of two members from each of the three contributing municipalities, is responsible in turn to the municipalities and to the Ministry of Health which funds a large proportion of the unit's budget. The public health programs in which the respondent is presently engaged can be designated as preventative health programs and as treatment programs. The preventative health programs, which are 75% funded by the Ministry of Health encompass the environmental hygiene program in which a number of public health inspectors work, a public health nursing program in which a number of public health nurses are employed and a dental program in which a dental hygienist and assistant are employed. The treatment program is presently limited to the home care program which is 100% funded by the Ministry of Health. Although home makers and V.O.N. nurses are engaged in the home care program the two physiotherapists are the only employees of the respondent assigned to this program. Both the preventative health programs and the home care treatment program are supported by a clerical administrative support unit. The disputed social worker who is employed on a research assignment of fixed duration reports directly to the Medical Officer of Health. His research assignment brings him into contact with the public health nurses in the treatment of chronic alcoholics.

4. Exclusive of the nurses who are presently represented in a separate bargaining unit, the applicant seeks bargaining rights for a unit of employees including the clerical and administrative support staff, the public health inspectors, the dental hygienist and assistant, the two physiotherapists and the social worker. As noted, the respondent and the objectors object to the inclusion of the two physiotherapists and the social worker.

5. The Board in determining the appropriate bargaining unit in a given situation performs a balancing function. On the one hand the Board must have due regard for the rights of employees to organize as they wish: the right of self organization. (See *Ponderosa Steak House* case [1975] OLRB Rep. Jan. 7). On the other hand, however, the Board must be mindful of its responsibility under section 6 of the Act to look to a bargaining unit which is "appropriate" in so far as it will support a viable collective bargaining structure. The considerations underlying the Board's balancing function have been succinctly described in the *Ponderosa* case, (*supra*) wherein at paragraph 12 it is stated:

"The determination of what constitutes a viable collective bargaining structure requires the Board to consider matters of industrial relations policy, such as community of interest and fragmentation of employees. Community of interest may be a requisite for viable collective bargaining, since the representation of disparate employee groups by one bargaining agent may put impossible strains upon it as it performs its role in the bargaining process. At the other extreme, a too narrow definition of community of interest may create undue fragmentation of employees, leading to a weak employee presence at the bargaining table, or the possibility of jurisdictional disputes among competing bargaining groups. It should be observed, however, that the Act does not create any presumption in favour of the most comprehensive unit of employees, even though these employees may have a community of interest..."

6. The respondent employer argued that the application of the principles set out in the leading *Usarco* case [1967] OLRB Rep. Sept. 526 and the *Essex Health Association* case [1967] OLRB Rep. Nov. 716 to the facts of this case must cause the Board to conclude that there is no community of interest between the physiotherapist and the social worker on the one hand, and the other classifications falling within the bargaining unit on the other. Indeed, the evidence establishes that there is very little, if any, *functional interdependence* in terms of work flow and/or physical interchange and that the *nature of the work performed* and the *skills* of the disputed employees are different than those of the other employees. It should be noted however that there is little if any functional interdependence between certain classifications which the parties have agreed to include within the bargaining unit and similarly the nature of the work performed and the skills between certain classifications agreed as included are equally as dissimilar. The respondent also argued that the unstructured and unsupervised work environment of the disputed classification should cause the Board to find no community of interest on the basis of dissimilar *conditions of employment*. In this regard all of the employees work under virtually the same benefit package and whereas the disputed classifications enjoy a high degree of freedom so also do the dental hygienist and the public health inspectors within their respective spheres of competence. The respondent argued as well that the *administration* of the home care plan was separate and distinct and that the full provincial funding and the ultimate provincial accountability differentiates the home care program from the respondent's other programs. The Board does not consider the funding arrangement as critical and whereas the home care program is run as a separate entity so also is the dental program.

7. The Board is faced with a similar problem to that which faced another panel of the Board in the *Stratford General Hospital* case, Board Files Nos. 1026-76-R and 1070-75-R, dated September 22, 1976. The Board in that case referred to the balancing responsibility of the Board in the following terms:

“...Solutions lie in the careful examination of evidence for significant differences in community of interest between occupational groupings bearing in mind the structural requirements for effective collective bargaining and labour relations. At the risk of being repetitive we think it important to observe that it is natural for certain groups of employees to be apprehensive about the outcome of collective bargaining if their occupation does not dominate a bargaining unit in sheer numbers and *seldom is the Board confronted with applications for certification affecting employees with identical interests, abilities and backgrounds. Thus, if the Board was to be preoccupied with these apprehensions an unmanageable proliferation of potentially ineffective bargaining units would be the likely result. Accordingly, the Board must concern itself with only significant differences between employee interests and these significant differences must result in practical bargaining unit demarcations* – practical in the sense that demarcations must provide efficient answers to like cases, there must be reasonable assurance that they can withstand the passage of time, and practical in the sense that sound collective bargaining relationships can be built upon them.”

. (emphasis added).

The Board in considering the separate interests of the disputed classifications in the instant case must be particularly mindful of the factors which have been set out above.

8. The Board went on to find in that case that all of the so called “para medical” classifications had made significant progress along the path towards “professionalism” so that no one occupation could claim a distinct community of interest on that count. The Board in that case discounted the factor of educational qualifications as giving rise to a separate community of interest and questioned whether it is appropriate to distinguish between university and community college education and not distinguish between distinct levels of university training. The Board in that case stated that:

“The evidence clearly demonstrates that all of the occupations are organized around the medical profession and despite the ethical stance taken by some witnesses we are satisfied that all the occupations are subordinate to that profession.”

and went on to conclude that in so far as each occupation had to rely upon information and analysis provided by the other occupations there was a functional interdependence between the two groups of occupations.

9. Drawing upon the reasoning as set out in the *Stratford* case, (supra) the Board is satisfied that the educational and professional qualifications of the physiotherapist and the social worker do not cause these classifications to have a separate community of interest within the Eastern Ontario Health Unit from either the public health inspectors or the dental hygienist both of whom complete, as a job requirement, post secondary school courses and who belong to professional associations each with a code of ethics and who are agreed as within the bargaining unit. Even if we were to find that the physiotherapists and the social worker were the only classifications which could, on the evidence, claim to be “professional” this would not in itself be sufficient to cause the Board to fragment an otherwise appropriate bargaining unit. (See *Essex Health Association* case, (Supra) and *Niagara Regional Health Unit* case [1975] OLRB Rep. Apr. 377).

10. In applying the tests as set out in the *Usarco* decision, (supra) the Board is satisfied that there is less of a community of interest between the physiotherapist and the other disciplines in the health unit setting than there is between the physiotherapist and the other para-medical disciplines in the hospital setting. The degree of difference stems from a diminished functional interdependence. This Board cannot conclude, as the Board did in the *Stratford* case (supra), that all of the occupations rely upon information and analysis provided by the other occupations and must be fully familiar with the significance of the activities of the other occupations. Although the various functions are subordinate to the Medical Officer of Health, in the health unit setting they do not focus on the patient but rather they focus on separate target areas in the community. Although the Medical Officer of Health retains the ultimate control and responsibility for the involvement of the respondent's employees, the employees themselves do not interrelate as the para-medical employees in a hospital.

11. The recognition by the Board of a lessened community of interest is not, however, determinative. It remains for the Board to weigh this factor in the performance of the balancing function which falls to it as has been described in paragraphs 5 and 7 herein, and to decide if the separate interests of the disputed classifications dictate that they be excluded from the all-employee unit. The Board is of the opinion, notwithstanding the unique skills of the disputed persons, the nature of their work and their lack of interdependence with other employees, they they should not be excluded from the bargaining unit. *Firstly*, their exclusion cannot be rationalized on the basis of the factors referred to above in the face of evidence which establishes that there are classifications agreed to by the parties as properly within the bargaining unit which are equally disparate. Reference is made specifically to the public health inspectors and the dental hygienist. *Secondly*, there is no evidence before the Board as would cause the Board to find that the interests of the disputed classifications could not be accommodated and advanced within the all-employee unit. Indeed, in the *Stratford* decision the Board was confident that professional or quasi professional classifications with separate work skills and training could and should bargain together. *Thirdly*, the Board is concerned in the circumstances with the potential for fragmentation. Obviously the disputed classifications could, if excluded, seek bargaining rights within a separate bargaining unit. In addition, if the respondent were to enter into new programs requiring "professional" skills the rationale giving rise to the request for the exclusion of the physiotherapists and the social worker would be equally applicable to whatever "professionals" might then be employed by the respondent. The result would be further fragmentation. The Board has weighed the separate interests of the disputed classifications against the potential negative effects of fragmentation as set out in paragraph 7 herein and has concluded that the long term viability of collective bargaining between the respondent and its employees would be best achieved within the parameters of an all-employee bargaining unit (exclusive of the public health nurses who bargain separately) encompassing the employees of both the preventative and treatment programs and the administrative support persons.

12. The Board in a decision dated May 7, 1976 certified the applicant pursuant to the provisions of Section 6(1a) of the Act. The Board now finds that all employees of the respondent employed in the united counties of Stormont, Dundas, Glengarry and Prescott-Russell and the City of Cornwall, save and except supervisors of nursing, the chief public health inspector, program directors and persons above that rank, the secretarial supervisor, the secretary to the medical officer of health, the secretaries to the business administrator at both the Cornwall and the L'Original offices, persons regularly employed for not more than

24 hours per week, students employed during the school vacation period and persons covered by a subsisting collective agreement, constitute a unit of employees of the respondent appropriate for collective bargaining.

13. A formal certificate will now issue to the applicant.
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0636-76-R Amalgamated Meat Cutter & Butcher Workmen of North America, A.F.L., C.I.O., C.L.C., (Applicant), v. **Culverhouse Foods Limited**, and Culverhouse Foods Incorporated, (Respondents).

Sale of a Business – S.55 – Effect of purchasing company buying from hidden owner rather than employer signee of collective agreement – Whether a sale of assets only – Effect of producing same goods after the sale – Effect of presence or absence of sale of goodwill.

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members J.D. Bell and O. Hodges.

APPEARANCES: *G.C. Charney for the applicant, M. Joseph Haffey, Q.C. for the respondents.*

DECISION OF THE BOARD: November 23, 1976.

1. This is an application under section 55 of The Labour Relations Act wherein the applicant union alleges that a sale of Culverhouse Foods Limited's business (hereinafter referred to as C.F. Ltd.) was made to the respondent, Culverhouse Foods Incorporated (hereinafter referred to as C.F. Inc.). The applicant requests that the Board issue a declaration that C.F. Inc. is thereby bound by the collective agreement between the applicant union and C.F. Ltd. effective from September 29, 1975 to March 31, 1977. Counsel for C.F. Inc. argued that the company is not bound by the collective agreement in question for two reasons: firstly, because the sale was made by Niagara Food Products Limited (hereinafter referred to as Niagara Foods) and not C.F. Ltd., the party to the collective agreement, and secondly, because a sale of a business within the meaning of section 55 of the Act did not take place.

2. The applicable portions of section 55 read as follows:

“55. (1) In this section,

(a) “business” includes a part or parts thereof;

(b) “sells” includes leases, transfers, and any other manner of disposition, and “sold” and “sale” have corresponding meanings.

- (2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a

party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purpose of the application as if he were named as the employer in the application."

3. The dispute in this case arises out of a transaction of purchase and sale which occurred on May 17, 1976 between Niagara Foods and 333658 Ontario Limited. At the first hearing of this case counsel for C.F. Inc. asked to have the style of cause of the application amended such that "333658 Ontario Limited" would read "Culverhouse Foods Incorporated." There is, therefore, no disagreement that the purchaser named in the said agreement for purchase and sale is the respondent to this application. The situation of the vendor, however, is not as straightforward. Mr. Robert Marran, a witness for C.F. Inc. and the owner of the seasonal and temporary employees hiring company, Corporate Services Co., testified that Niagara Foods purchased part of C.F. Ltd. in July 1972 from Mr. Medland. According to the further testimony of Mr. Denis Marien, the secretary-treasurer of C.F. Ltd. until spring 1976, Niagara Foods purchased the rest of C.F. Ltd. in February, 1976. Thus by February 1976, C.F. Ltd. was the wholly owned subsidiary of Niagara Foods.

4. Counsel for C.F. Inc. argued that because Niagara Foods owned C.F. Ltd. at the time of the sale but was not stated to be the employer in the collective agreement, section 55 could not apply. The Board cannot accept this argument. It would be directly contrary to the purpose of section 55 if through a double sale an employer could avoid the applicability of section 55 under circumstances wherein it could not do so within the framework of a single sale. In *Dufferin Steel Company Awico Division*, [1976] OLRB Rep. March 81 at p. 84 the Board set out the two-fold purpose of section 55, the first being to prevent an undermining of bargaining rights and the second being to provide a permanence for established bargaining rights:

"It is obvious that the section is intended to prevent the undermining or subversion of bargaining rights by means of transactions designed to allow an employer to escape his contractual and/or legal obligations with respect to a trade union... The section... was also designed to preserve bargaining rights in those situations where the transactions result in a 'continuum' of the business... The rationale in support of this second and equally important purpose of the section is well stated in the *Aircraft Metal Specialists Limited* case (1970) OLRB Rep. Sep. 702:

'A further and important purpose of section 47A (now section 55) is to preserve the bargaining rights with respect to work which has accrued to the benefit of the employees as a result of their union becoming the bargaining agent through certification or voluntary recognition. Once the union has been recognized with respect to a particular business the union then obtains a right to bargain with respect to wages, hours and other conditions of employment in that business. The right to participate in the business and its functions in that manner is in the nature of a vested right and section 47A (now section 55) allows the union to pursue that bargaining right when all or part of the business is sold.'

This rationale indicates that to fulfil the two purposes of section 55, the bargaining rights of the employees must be vested in the business rather than the particular employer, a position supported by the Board's earlier statements in *Marvel Jewellery Limited and Danbury Sales (1971) Ltd.*, [1975] OLRB Rep. Sept. 733 at p. 735:

"Section 55 recognizes that collective bargaining rights, once attained, should have some permanence. Rights created either by the Act, or under collective agreements, are not allowed to evaporate with a change of employer. To provide permanence, the obligations flowing from these rights are not confined to a particular employer, but become attached to a business. So long as the business continues to function, the obligations run with that business, regardless of any change of ownership."

Accordingly, therefore, the crucial element for the applicability of section 55 is whether or not there is a continuum of the business of the employer who was the original party to the collective agreement and not whether the purchasing employer bought directly from the employer named in the collective agreement.

5. The second and equally important reason why the Board cannot accept the respondent purchaser's argument is that to do so would violate the clear wording of section 55. In unambiguous terms section 55 states that where there has been a sale of a business within the meaning of section 55, the purchaser employer is bound by the collective agreement unless and until the Board declares otherwise. This provision is as potentially applicable to the February 1976 transaction as it is to the May 1976 transaction. Thus as long as the February transaction between C.F. Ltd. and Niagara Foods constituted a sale of a business within the meaning of section 55 (a point which will be addressed momentarily), Niagara Foods became bound in February by the collective agreement in question "as if [it] had been a party thereto." Accordingly then, under such circumstances, at the time Niagara Foods sold to C.F. Inc. in May 1976 it would have been made a party to the collective agreement in question by operation of law, thus making section 55 directly applicable to the situation at hand.

6. As referred to above, the conclusion that Niagara Foods became a party to the collective agreement in question through the February sale, and thus the possibility that C.F. Inc. may now be bound in its place by the same collective agreement by virtue of the May sale is directly dependent on whether or not a sale of a business occurred in February within the meaning of section 55. The evidence tendered indicates that the sale in February was a paper transaction, i.e. that the business itself remained entirely the same and that the change related solely to the ownership. Mr. Denis Marien, the secretary-treasurer for C.F. Ltd. until Spring 1976, stated on cross-examination that the change that occurred as a result of the February sale was one of internal management only. Mrs. Verla Mower the pay clerk for C.F. Ltd., never mentioned the February sale when referring to the employment history of the individuals from December, 1975 to June, 1976. At the end of May, Mrs. Mower processed the termination of many employees giving as the reason, the termination of the business. For the February sale, however, no such terminations were affected. Additionally, Mr. Irvin Dawson, the international representative of the applicant union, testified that he received a letter in May informing him of the sale of C.F. Ltd. to C.F. Inc. but received no such letter for the February sale to Niagara Foods. The closeness of the relationship is further expressed in the wording of the May, 1976 sale:

“AND WHEREAS the Vendor desires to sell and the Purchaser desires to purchase certain assets owned by the Vendor or Culverhouse Foods Limited and used in connection with Culverhouse Foods business ...

1. Subject to the terms and conditions hereof, the Vendor agrees to sell and the Purchaser agrees to purchase certain assets ... as specified herein, owned by the Vendor or Culverhouse Foods Limited and used in connection with Culverhouse Foods business of manufacturing and selling food products as now carried on by the Vendor ...”

7. As was set out in *Marvel Jewellery Limited* at p. 735 and as will be expanded in greater detail below when considering the May transaction, the test for whether there has been a sale within the meaning of section 55 is as follows:

“The question in each case is whether there has been a transfer of the functions carried on prior to the sale or, put more simply, whether there has been a continuation of the business. This question must be answered by examining the totality of the transaction and not just by glancing at the outward form of the transaction.”

On the basis of the above stated nature of the February transaction, the Board finds that there was a continuation of the vendor's business and that therefore a sale within the meaning of section 55 took place. Accordingly, Niagara Foods became bound by the collective agreement in question between C.F. Ltd. and the applicant union such that by operation of law Niagara Foods was a party to the collective agreement in question at the time of the sale in May, 1976.

8. The Board must now determine whether the May, 1976 sale constituted a sale of a business within the meaning of section 55. Counsel for C.F. Inc. argued that a section 55 sale did not occur for either of two reasons: firstly, because the transaction in question amounted to a sale of assets and not a sale of a business or, secondly, because the business carried on by the respondent successors is of such a different character that it cannot be said that there was a continuation of the predecessor's business.

9. The agreement for purchase and sale itemized the following assets:

Goodwill	\$ 1.00
Real Property	95,000.00
Buildings	150,000.00
Machinery	100,000.00
Vehicles	45,000.00
Trade Marks	1.00
Total	<u>\$390,002.00</u>

In addition to the sale of these assets, the vendor became bound by several covenants: In paragraph 10 the vendor undertook to expeditiously change its name to a name in which “Culverhouse” would not form a part and to give whatever consent would be necessary to enable the purchaser to adopt a name of which “Culverhouse” or some similar name could form part. As well, in paragraph 11 (e) the Vendor agreed to make efforts to ensure a transfer of the “licences (as a processor of asparagus, tender fruit, berries or vegetables) issued by

the Farm Products Marketing Board and dated April 13, 1976.” The agreement did not include a sale of accounts receivable and accounts payable, nor did it include the sale of existing contracts or a list of customers. A letter of intent, however, was given to C.F. Inc. by the Weston Conglomerate (of which Loblaws forms a part) that it would continue to purchase goods from C.F. Inc. Although the agreement itself did not include the sale of inventory, the testimony of Mr. Robert Marran and Mr. David Brown, a former C.F. Ltd. employee, established that some inventory was subsequently purchased under a separate agreement.

10. Several cases provide the Board with guidance for determining whether or not there has been a continuation of the predecessor’s business, i.e. whether the above sale of assets and covenants amounts to a section 55 sale of a business.

11. As referred to above, the *Marvel* decision sets out the basic principle that in each case the question must be whether or not there “has been a transfer of the functions carried on prior to the sale or, put more simply, whether there has been a continuation of the business.” The Board concluded in this case at p. 735 that a section 55 sale of a business had taken place although the agreement itself looked like a mere sale of assets:

“In this case, we conclude that the sale by the receiver to the Danbury-Shirene partnership constituted a sale of a business. Although the formal transaction may have given the appearance of a sale of assets, the assets were purchased as a block giving the partnership the option of either liquidating immediately or continuing to run the business on a reduced scale until inventories were depleted. It is clear that this latter course of action was followed, partly because it was likely to realize more money and partly because it offered to the Hennick’s the possibility of reviving the *Marvel* operation after inventories were liquidated.”

Thus the Board concluded that the sale of the assets really amounted to a sale of a business under section 55 because the block sale gave the purchaser the option of continuing the business if he so desired.

The *Marvel* case offers the Board further guidance in its discussion of the significance of the absence of the specific sale of “goodwill, either in the form of a restrictive covenant, acquisition of the trademark or logo, or acquisition of existing contracts or orders.” With the following observation at pp. 735-736, the Board rejected the respondent’s argument that the failure to specifically sell these items indicated that the sale was one of assets alone rather than a business:

“The new concern continued to manufacture rings using the *Marvel* logo and it would appear that, for certain purposes, it continued to play upon the *Marvel* name by using the name “Danbury-Marvel” to identify the partnership. The two principal officers of *Marvel*, the Hennick brothers, and many of the former management were involved in the operation of the partnership. As a result, the partnership retained a considerable amount of *Marvel*’s goodwill, knowledge and expertise. In addition, the new concern acquired the right to collect *Marvel*’s wholesale accounts receivable, which provided it with a means of retaining contact with *Marvel* customers. Nor do we consider that *Marvel*’s goodwill was dissipated during the three-week shutdown

that occurred in July, this shutdown being far too short to break the continuity of the business operation.

The fact is that the business continued to operate after the sale occurred. The same goods were being produced by the same employees, the only difference being a reduction in the scope of the operation. Although Danbury and Shirene may have had somewhat different reasons for continuing the operation, Shirene being more concerned about reviving the business once it had been rundown, these different motives do not subtract from the fact that the partnership continued to run the same business as was carried on by Marvel prior to the sale.

We, therefore, conclude that there was a sale of the business of the Danbury-Marvel partnership."

The *Marvel* case chrystalizes the Board's position that a sale of assets alone may amount to a sale of a business and that the absence of the specific sale of factors such as goodwill, trademarks, and existing contracts is not determiniative of the issue. In concluding that there was a continuation of the business the Board highlighted above all else the fact that the goods produced both before and after the sale were the same. We might note at this point that it is of particular interest to the case at hand whether the "same goods" referred to in the last above quoted paragraph means the same kind of goods or whether it means identical goods; in the case before the Board counsel for the respondent has argued that the predecessor company's slight alteration in the type of vegetables canned indicates that the predecessor's business is not being continued by the respondents. A suggested resolution of this question will be offered below after a number of other cases have been discussed.

12. Several other cases similarly indicate that the presence or absence of goodwill as an itemized factor of sale is not decisive and that the important consideration is whether the goodwill has in fact been transmitted, in other words whether the prior business is continuing to operate. In *Perma-Mix* [1971] OLRB Rep. April 242 as in *Marvel* and *Thorco Manufacturing Ltd.* [1965], 65 CLLC, the fact that the name or part thereof, was transferred was considered an important factor in indicating that the goodwill had in fact been transferred although not specified. In *Winco Steak N'Burger Restaurants Limited*, [1974] OLRB Rep. Nov. 788 the Board found that although the name wasn't transferred, it was clear that the goodwill of the business was indeed intended to be transferred from the covenants in the contract wherein the vendor undertook to maintain its good name until closing and to assist in the assignment of the liquor licence. Additionally, *Thorco* indicates that no price need be paid for either the goodwill or any other items that might indicate that the goodwill has been transferred. The Board at p. 788 states:

"Even assuming, however, that there was no separate consideration in point of law which could be said too have been paid by the respondent to Thor for the acquisition of the metal fabrication business, the presence of McGovern and Newton, who were executive officers of Thor and who were also at the same time the real sponsors of the respondent company, obviously made it a virtual certainty that the disposal of this portion of Thor's business to the respondent would accompany, as it did the acquisition of the assets."

13. In the *Dufferin Steel* case, *supra*, the Board itemized factors which the Board might consider in determining whether or not there has been a section 55 sale: goodwill, described at p. 86 as “the attractive force which brings in customers”, and its sources, i.e. good name, reputation and business connections, good relations with employees, favourable commercial contracts, franchises, good financial relationships and good management, and the continuation of employees.

Notwithstanding the importance of the above, the Board was very clear to emphasize that these factors are only significant to the extent that they resolve the more important question of whether or not the business sold continued after the sale. The Board indicated that the most relevant factor for determining this question is whether the nature of the work performed subsequent to the transaction is the same as the work performed prior to the transaction. The Board focused on this crucial question with the following observation at p. 87:

“A successor employer cannot mask the facts of a continuation of the business by dismissing the employees of the predecessor and neither should the fact of his continuing to employ these persons be determinative of a sale within the meaning of section 55 of the Act. The more relevant consideration must surely be the nature of the work performed subsequent to the transaction, whether by the same or by different employees.”

In the *Dufferin Steel* case the Board found that no section 55 sale of a business had taken place primarily because the nature of the work performed before and after the business was not of sufficient similarity – before the sale the employees were engaged in the production of Ornamental iron and miscellaneous steel products, while after the sale they were engaged in the production of plate work to the exclusion of ornamental iron or miscellaneous steel jobs.

14. In *Provincial Fruit Company (Ottawa) Limited*, [1976] OLRB Rep. Nov. 830 the applicant argued that the purchase of a lease of floor space at the Ontario Food Terminal amounted to the sale of a business under section 55 even though the sale of assets and inventory did not include the sale of goodwill, accounts receivable, or customer lists. The Board in focusing on the comparative nature of the two businesses as the primary concern, stated that the variation in the type of fruits and vegetables sold and the point of origin of the produce (United States rather than Canada) did not detract from the finding that there was a continuation of the business since both before and after the sale the employers were engaged in the sale by wholesale of fruit and vegetables.

15. Referring back to the question raised by *Marvel* as to the meaning of the “same goods”, both *Provincial Fruit Company* and *Dufferin Steel* would indicate that the “same goods” in *Marvel* probably implies the same kinds of goods rather than identical goods. In *Provincial Fruit Company* the Board directly rejected as important the alteration in the type of fruit or vegetable sold, and in *Dufferin Steel* the Board focused on the *nature* of the business as the determining factor.

16. In light of the above cases, we can summarize the principles appropriate for determining whether a particular transaction amounts to a sale of a business under section 55 as follows: In each case the decisive question is whether or not there is a continuation of the business. (See particularly *Marvel* at p. 735). The most appropriate test to be applied in making this determination is whether the nature of the work performed subsequent to the

transaction is the same as the nature of the work performed prior to the transaction. (See particularly *Dufferin Steel*, at p. 87 *Marvel* at p. 736, *Provincial Fruit Company* at pp. 833-834). *Provincial Fruit Company* and *Marvel*, on the one hand and *Dufferin Steel*, on the other, provide scope to the word "nature". In *Provincial Fruit Company* a variation of the type of fruits and vegetables sold as well as the point of origin of those products was found not to amount to an alteration of the nature of the work performed. As well, in *Marvel* the decrease in the scope of the business was found not to detract from a finding that the nature of the business was continuing since the same goods were being produced. On the other hand, in *Dufferin Steel*, the purchaser's alteration of its product from ornamental steel to plate steel was found to constitute work of a different nature.

En route to a determination of the above essential questions the cases offer a countless variety of factors which might assist the Board in its analysis: among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good name until closing or any other obligations to assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding whether there is a continuation of the business. Additionally, the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or non-existence of a hiatus in production as well as the service or lack of service of the customers of the predecessor have also been given weight. No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same it was before, i.e. whether there has been a continuation of the business.

17. With this review of the law the Board is now in a position to assess the significance of the May transaction. As indicated above, counsel for the respondent asked the Board to find that a section 55 sale of a business had not occurred for either of two reasons: firstly, because the transaction amounted to a mere sale of assets or, secondly, because the successor's business was of such a different character that it could not be said that there was a continuation of the predecessor's business.

18. In support of the first aspect of the argument, counsel for the respondent pointed out that the goodwill was sold for only \$1.00 and that the agreement itself specified that the subject of the sale was assets not a business. In view of the evidence and the case law, the Board rejects this suggested characterization of the transaction and finds that the transaction amounted to the sale of a business rather than the sale of a bundle of assets. As detailed above, in innumerable cases the Board has found that the actual itemization of goodwill is not necessary to the finding of a section 55 sale. In neither *Marvel*, *Provincial Fruit Company*, *Perma-Mix*, *L & M Food Market*, [1965] OLRB Rep. Dec. 656 nor *Thorco* was goodwill specified as an item of sale and yet in each of those cases the Board found that a sale of a business had taken place. In the instant case goodwill was specified. The fact that the goodwill was sold for \$1.00, i.e. at far less than its value, is in the Board's eyes insignificant in view of the fact that in *Thorco* it was established that no separate consideration in point of law need be made for the acquisition of a business, and in view of the fact that other factors

indicate that the goodwill or the "attractive force which brings in customers" was indeed transferred. The trademark was sold for \$1.00 (the sign of the arrow and the name "Culverhouse"). The vendors undertook to change their name so that it would not be confused with the successor's name as well as to do what it could to facilitate the successor's adoption of a name which contained the name "Culverhouse." Additionally, the vendor undertook to assist the purchaser in the transfer of the licences required for the production of its products. Evidence further established that some of the inventory was sold to the successor under a separate agreement. As well, Loblaw's gave the purchasers a letter of their intention to continue purchasing the Culverhouse product. None of the above transfers or covenants would have been appropriate if the transaction was intended to be the purchase and sale of mere assets. Thus, the content of the agreement(s) and letter of intent indicates beyond question that the subject of the sale was a business.

19. The Board finds the second branch of the company's argument equally untenable and does not accept the suggestion that the new business is so different from the old business that it cannot be said that there has been a continuation of the business. C.F. Ltd. was in the business of canning fruits and vegetables, so is C.F. Inc. Counsel for the respondent argued that because asparagus was not canned this year as it was last year and because the successors have canned more potatoes than the predecessors the business is not the same. Additionally, the respondent counsel took the position that because the purchasers closed one of the predecessor's two plants the business was no longer the same. *Provincial Fruit Company* clearly rejected the importance of a minor variation in the type of fruit or vegetable sold [or produced]; *Marvel* directly stated that a reduction in the scope of the business did not alter the nature of the business. Mr. Marran's testimony indicated that the customers have remained unchanged except to the extent that the successors now enjoy more business from the Dominion Stores because of the change of ownership. The testimony further established that numerous employees and some foremen of the predecessor have continued to work for C.F. Inc. Mr. Marran and Mr. Brown testified that the old Culverhouse labels are still being used on those cans which have not been labelled to order. That the ownership is now in the hands of a single individual rather than a conglomerate, that 50% of the old machinery has been replaced or revamped, that employees are now paid by cheque instead of cash, that there are fewer (if any) permanent employees presently employed and that there are more seasonal employees than there were before does not in the Board's eye, detract from the overwhelming evidence that the nature of the business is the same now as it was before the transaction. The respondent put much weight on the existence of a new hiring scheme in trying to show that the character of the business is different. Without getting into the details of the operation of Mr. Marran's Corporate Services Company, the Board is of the view that the process by which the employees acquire their position with the respondent, i.e. whether they are hired by the respondent or some other company on behalf of the respondent, is of less significance than the work performed by those employees. As the C.F. Inc. employees are performing the same skills and producing the same product as they did under the former owner, the conclusion is inescapable that the business of C.F. Ltd. is being continued by C.F. Inc.

20. The Board, therefore, finds that through the transaction of May 17, 1976 the respondent has purchased a business within the meaning of section 55 of The Labour Relations Act. By virtue of this sale and by the operation of section 55 the respondent became immediately bound by the collective agreement between the vendor (Niagara Foods) and the applicant union. Since the Board also found that the transaction between Niagara

Foods and C.F. Ltd. in February 1976 was a sale within the meaning of section 55 and that thereby Niagara Foods became bound by the collective agreement between the applicant union and C.F. Limited, effective from September 29, 1975 to March 31, 1977, it is this collective agreement by which the Board now finds that the respondent purchasing company is bound.

0950-75-U Claude Browne, (Complainant), v. **Canron Ltd., Eastern Structural Division**, (Respondent), v. Canadian Workers Union, (Intervener).

Discharge for Union Activity – s. 79(4a) – Whether the section applies to discharges made before the section was passed – Effect of employer justifying discharge on basis of false employment application when falsehoods were pursued for unexplained reasons after employee had been with company for some time.

– Compensation – Effect of delay in bringing complaint.

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members O. Hodges and F. W. Murray.

APPEARANCES: *George Flak for the applicant; Edward T. McDermott for the respondent; Gary Perly for the intervener.*

DECISION OF THE MAJORITY (R.F. Egan and O. Hodges); November 26, 1976.

1. This is a complaint under section 79 of the Act in which the complainant alleges that he has been dealt with by the respondent, contrary to the provisions of sections 3, 14, 56, 58, 61, 62, 63, 66, 67, 70 and 71 of The Labour Relations Act.
2. The complainant was suspended by the respondent on February 19, 1975, and was discharged on February 25, 1975. The reason stated by the respondent for the suspension and the discharge was that the complainant had given false information on his application for employment form.
3. The respondent took the position that Browne's conduct violated the major offences part of the plant rules. The relevant parts of the rules are as follows:

“Any employee committing any of the offences listed below will be subject to dismissal without notice. However, in order to protect an employee against losing his job unfairly, the circumstances surrounding the following will be individually considered.
6. Making false statements or withholding vital information when applying for employment or a falsification of evidence when official investigations are being conducted.”

4. At the time the complaint was filed, the Canadian Workers Union (hereinafter called the CWU) was an applicant for certification as bargaining agent for a group of employees of the respondent represented by Shopmen's Local Union 743 of the International Association of Bridge, Structural and Ornamental Ironworkers (hereinafter called Ironworkers). Upon a motion made by the CWU which was opposed by the respondent, the Board ruled that the CWU had sufficient interest in the matter to be added as a party and so directed.

5. The complainant sought the following relief:

"The complainant requests that the Board order the respondent to:

1. reinstate the grievor with full compensation for lost earnings and lost employee benefits and with full seniority rights and with an employment record cleared of any reference to the matters herein;
2. cease doing the acts complained of or similar acts;
3. rectify the acts complained of.

6. The CWU sought the same relief for the complainant and in particular the injunctive relief.

7. The respondent moved that the complaint be dismissed on the grounds that it was not filed promptly. The discharge occurred on February 25, 1975 and the complaint was not filed with the Board until September 19, 1975. The Board, having heard the representations of the parties and having taken into consideration the particular circumstances of the case, denied the respondent's motion but indicated that the delay in filing the complaint would be taken into account if compensation was to be awarded.

8. The respondent also moved that the complaint be dismissed because the complainant had filed a grievance through the incumbent bargaining agent which grievance had been denied by the company and dropped by the Ironworkers. The respondent contended that since no collusion between the company and the Ironworkers had been demonstrated and since no charges had been laid under section 60 of the Act, the Board ought to dismiss the complaint. The Board again, having considered the representations of the parties including the relevant jurisprudence, denied the motion, having regard to the particular circumstances of this case.

9. The respondent took the position that section 79(4a) of the Labour Relations Act was not applicable in the present case by reason of the fact that it had not been enacted at the time the offence complained of arose. Section 79(4a) provides as follows:

79.-(4a) On an inquiry by the Board into a complaint under subsection 4 that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization. 1975, c. 76, s. 21(1).

10. Complaints were filed by Ed Taubert who was discharged on April 25, 1975, and Tom Conlan who was discharged on May 13, 1975, embodying the same allegations and statements of fact as are contained in the Browne complaint. The Board denied a motion for consolidation of the three discharges, having heard the representations of the parties. The motion was denied, having regard to the submission of the respondent that it would be unduly prejudiced in attempting to deal with the three cases which were distinct as to time, circumstance and alleged reasons for the acts taken in each case and to the practical considerations of conducting an orderly procedure.

11. The Board ruled that section 79(4a) deals only with procedural matters and did not affect the nature of the offence complained of and that, consequently, it was applicable to the present case.

12. On August 18, 1976, the Board (Mr. F. W. Murray dissenting) delivered an oral decision in which it directed reinstatement of Browne. This was followed by a direction in writing (Mr. Murray again dissenting) to the respondent dated September 2, 1976, that Browne be forthwith reinstated. The Board, in its oral decision indicated that it had not dealt with the question of compensation and had, in brief, left it to counsel to attempt to arrive at an agreement on this aspect. The parties, however, have advised the Board that no agreement could be reached on the question of compensation and requested the Board to deal with the matter.

13. The respondent has requested the Board to give its reasons in writing. The reasons and the disposition of the question of compensation are set out below.

14. Because reference has been made to the particular circumstances of this case, we wish to point out that the issue of Browne's discharge arose during the course of an organizational campaign on the part of CWU which as, already observed, was attempting to displace the incumbent Ironworkers as bargaining agent.

15. The complainant and the intervener through direct evidence and through a very lengthy cross-examination of the respondent's Plant Manager, Thomas McBarron, sought to demonstrate that the respondent had displayed bias against CWU and in favour of the Ironworkers. There was evidence heard concerning the distribution of pamphlets at the plant by Ironworkers which the complainant and the intervener alleged was in contravention of a rule posted by the company around the middle of January 1975. The supporters of CWU grieved against this alleged violation of the rule but the grievance was denied by the company. There was evidence with respect to the display of decals and badges by the supporters of the two rival unions and of directions for their removal. The rule against organizational activities with respect to which the CWU attempted to grieve does not appear however to have been enforced to any effective degree against either one of the contending unions or their partisans. This is so notwithstanding the fact that at one stage, the general foreman was of the opinion that the rule did not apply to the Ironworkers and only to the CWU.

16. In weighing the evidence, the Board cannot escape taking into consideration the fact that the maintenance of even the appearance of neutrality in a raid situation is a difficult one for an employer. This is so because the incumbent union must be treated by the company in a manner distinctly different to that which it must adopt towards an applicant

union. A company in the circumstances under consideration must keep a balance between its legal obligations under the Labour Relations Act with respect to a union which is seeking to organize its employees, and its duties under that Act together with its obligations under its collective agreement to the union which is, by law, the exclusive bargaining agent for its employees. There can be no change in its attitude toward the incumbent union even with respect to matters not directly covered by the collective agreement without putting itself in some jeopardy of the sanctions of the Act. By the same token, it cannot treat the applicant union as it must treat the bargaining agent. Furthermore, in a situation where, as here, a relationship has existed for some 17 or 18 years, certain customs and usages which have developed under that relationship cannot be summarily withdrawn from the incumbent union or granted to the applicant without danger of appearing to favour one union over the other. In this context it is to be remarked that the company issued instructions to its foreman that the unions' problems were not their problems and that they (that is the foremen) were not to take part but simply to follow the collective agreement.

17. The applicant and the intervener also relied upon the fact that the two other employees (Taubert and Conlan to which reference has already been made) who were open supporters of the CWU had been discharged by the respondent as evidence supportive of their contention of prejudice by the respondent against the CWU. These cases were pending a hearing before the Board at the time. Evidence was heard with respect to these discharges on the submission that they had relevancy with respect to *animus* notwithstanding and subject to the fact that they occurred on April 25, 1975 and May 13, 1975. No evidence, however was given by either of these complainants under different circumstances and for allegedly different reasons.

18. The Board was asked by the complainants to take into consideration the fact that when the CWU applied for certification in March of 1975 the company challenged its status as a trade union, although the Board had previously granted same. The status of an applicant union is a matter of legitimate concern in all applications for certification by reason of the requirements of the Act in that regard, so that attacks on status must be carefully viewed in the whole context of the proceedings. The evidence of the certification is not before this panel of the Board.

19. The evidence is that Claude Browne was hired by the respondent on or about August 26, 1974. He was given an application form to complete which required a listing of his former employers. Browne falsely inserted the names of three alleged former employers. This fact was not disputed by the complainant.

20. Evidence was given by Neil Scheele who is the Plant personnel Officer that at the time Browne was hired, there was a heavy recruitment program being carried on, as a result of which there was no time to go into the details of the application form at the time of hiring. It was Scheele's testimony that Browne and other applicants were simply sent by the personnel office to the floor supervisor for an interview. If the floor supervisor concerned found the applicant acceptable, the latter was sent back to the personnel office to get an application form which was simply accepted and filed.

21. In December 1974, some four months after Browne had been hired, Scheele testified, it was discovered in the course of checking the application forms that the former employers listed by Browne could not be traced. Scheele discussed this matter with McBarron.

the plant manager, and with Evelyn Tashnik. The latter is employed in the office and deals with office personnel and also conducts interviews for the employees in the plant and processes termination forms.

22. The evidence is that McBarron, Tashnik and Scheele decided not to do anything about the matter of Browne's application form at that time. McBarron is reported by Scheele to have said that the matter could keep. The evidence is that a decision was reached to leave the matter until the time came for checking income tax forms early in 1975.

23. It is significant to note that at this time of Browne's employment history with the respondent he had taken no overt part in the organizational activities of the intervener.

24. Towards the end of January 1975, Evelyn Tashnik called Browne to the office and questioned him concerning his application form. Brown did not attempt to rectify the falsehoods in the application but, on the contrary, indicated to Tashnik that the firms he named were in Toronto.

25. It was stated in evidence that the information concerning previous employers was required in order to check if the person concerned had been a good employee who did not take too many days off and to see if he was an honest employee, and also to determine his qualification for promotion or training. It is to be noted, however, that there was no formal procedure laid down by the company nor did there appear to be any written records kept with respect to the replies that might be received to such inquiries. It is also to be noted that at the time that Browne was interviewed by Tashnik, he was well past his probationary period, was considered to be an average employee, and had survived two warnings, one for lateness and the other for absence from his work station. The real value of any information that might have been gathered from a previous employer of Browne at that stage in his employment would therefore appear to be minimal and hardly worth the expending of much time and effort. Nevertheless, the matter was pursued by Tashnik.

26. Having the latter in mind, the fact that the initiation of the inquiries by Tashnik virtually followed certain incidents which clearly indicated an active interest by Browne in union activities supporting the CWU in its efforts to displace the Ironworkers, raises the serious point as to whether those inquiries were merely coincidental with Browne's activities or were the result thereof. This is a question of cardinal importance in this whole issue.

27. The incidents referred to include the facts that Browne had been ejected from an Ironworkers union meeting on January 12, 1975 and that he was also involved in attempting to obtain and prepare a grievance against the Ironworkers for an alleged breach of the rule against the carrying on of organizational activities in the plant.

28. When Scheele was being cross-examined concerning the Browne investigation, he stated that he had only played a minor role in the investigation and that Tashnik had conducted the inquiry into the Browne application almost exclusively. Tashnik, however, was not called by the respondent. Had there been some clarification by Tashnik on this matter of the timing of the investigation, the evidence of Scheele and McBarron with respect to the postponement of the inquiries which later assumed such great significance, might have appeared to be less self-serving than it does in the absence of such evidence. Tashnik's testimony might have been of some assistance to the Board in clarifying why the inquiry, which "could keep" in December, became a matter for dismissal in February.

29. On February 16, 1975 Browne was again ejected from an Ironworkers meeting. The police were called to remove him and the incident became a big topic of discussion in the plant. The following day Scheele reported to McBarron that Browne's employment history could not be verified. A meeting took place between McBarron and Tashnik, after which McBarron testified he became convinced that Browne had deliberately falsified his application.

30. Browne was called to the personnel office on February 18, 1975, the day following the meeting between McBarron and Tashnik. In the meantime, McBarron had instructed the personnel office to prepare a suspension notice. At the meeting with Browne which took place in the presence of a Union Steward, he was confronted with his application form and was told that it was falsified. Browne took the position that it was up to the company to prove the truth of its accusation. He was told he was being suspended pending further investigation and was given the notice which had been prepared in advance of the meeting.

31. On the evening of Browne's suspension, 4 persons came on the respondent's property with bullhorns and created a disturbance which necessitated the calling of police. McBarron testified that the respondent was aware that the disturbance on February 18th had had something to do with Browne and the CWU.

32. During the course of a meeting held on February 19, between McBarron, the afternoon foreman and Stuart Eccles, the Operations Manager of the company, concerning this incident, Eccles received a phone call. He left the meeting. Some 5 minutes later Eccles was seen physically escorting Browne off the company's premises. Browne's evidence is that he had gone on the property at a fixed break for the purpose of filing a grievance with respect to the suspension.

33. It would appear that the telephone call to Eccles was to advise him of Browne's presence on the property. A crowd of employees gathered about Eccles and Browne and an announcement was made that Eccles was making a "citizen's arrest" of Browne for trespassing. The incident ended with the arrival of police and subsequently charges, particularly of trespass were laid against Browne. These charges were later dismissed.

34. It is to be recalled that Browne's suspension had been based upon his falsification of his application documents. That being the case, it is somewhat difficult to understand Eccles' action in arresting an employee accused of that kind of transgression on the grounds of trespass. There is an initial incongruity in the situation which invites an explanation in view of the circumstances existing in this case. Eccles was not called as a witness so that the Board is without his evidence as to whether his sudden departure from the meeting and his subsequent "arrest" of Browne were purely because of the matter of his documents or were also based upon Browne's connection with the CWU. It is to be recollected that Eccles is the manager of operations of the respondent and is McBarron's superior, so that his actions are of considerable significance. On the other hand, while the lack of explanation by Eccles cannot be viewed as by any means decisive, in the issues before the Board it is nevertheless of some relevance to the questions raised by the complaint.

35. The investigation into the matter of Browne's previous employment was conducted by Evelyn Tashnik on McBarron's instructions following the above incident. A grievance meeting was arranged for February 25 as the first stage in the grievance procedure dealing with Browne's suspension.

36. The evidence is that Tashnik obtained a letter from a firm called S & L Construction indicating that Browne had never been employed by that firm. The firm was the only one with a name resembling that given by Browne as one of his former employers. On February 24th, that is the day before the grievance meeting, Tashnik gave McBarron a clipping from a publication called "New Canada". This clipping showed that Browne had been employed at the University of Toronto in 1973 where he had been involved in a labour dispute. The clipping was from a New Canada issue for February 1974 and was therefore approximately a year old at that time. Then Tashnik got in touch with the University of Toronto and later, after the discharge, obtained a confirmatory letter from the university.

37. Copies of New Canada were filed with the Board. It is a publication which, on the face of it, supports and encourages the formation of Canadian unions which are completely independent and opposed to international unions. It is not entirely surprising that the management of Canron would be interested in New Canada since the CWU was organizing in its plant and the paper carried articles dealing with that situation.

38. Assuming the validity of that interest in the current situation, there still remains the question as to why the research into and perusal of back numbers of this publication were carried to the extremes to which it was in Tashnik's investigation of Browne's previous employment, particularly since the reasons given for his suspension and discharge were solely on the basis of his falsification of documents concerning which there appeared to be ample evidence. The question arises, in view of the very nature of the publication and its obvious support of CWU, as to whether the research into its back numbers was due, not so much as an attempt to discover Browne's prior employers, as one to explore his former and indeed present connections with CWU. This question must remain unanswered in view of the fact that Tashnik was not a witness. The case of course cannot be said to turn on this issue alone.

39. The grievance meeting was duly held on February 25. At this meeting Browne was again confronted with the accusation that he had falsified his application form. Browne, in effect, and consistent with his prior conduct, put the company to the proof of its allegations. McBarron stated that he became convinced at this time that Browne had lied and discharged him for that reason.

40. There is, in addition to the foregoing, uncontradicted evidence that the rule with respect to falsification and the accompanying liabilities for its infraction were in existence as part of the collective agreement long before Browne's first appearance at the respondent's Personnel Office. Neither the offence nor the punishment therefore were created particularly to take care of Browne. There is also the admission of Browne made to the Board that he had, in fact, made false entries on his application form. This fact, of course, clearly placed him in jeopardy of the sanctions. It is also to be noted that Scheele's evidence was that the whole matter started simply as an attempt to straighten out Browne's application form and that it was Browne's obstinacy and stubbornness that caused the matter to reach the proportions which it did. An additional factor which cannot be ignored by the Board is the fact that McBarron, throughout a cross-examination which extended over the course of 11 days, reiterated in response to the constantly repeated questions of the intervener that he had not discharged Browne for union activities.

41. The Board, having reviewed all the evidence, has had a great deal of difficulty in reaching a decision in this matter. On the basis of all of the evidence that was adduced before it, the majority of the Board reached a point in its deliberations where the evidence was found to be in balance and that it was necessary, therefore, to revert to the question of onus under section 79(4a). The Board, as announced in its oral decision, finds that the respondent has not discharged the onus placed upon it by the provisions of the foregoing section.

42. In its decision of August 17, 1976, the Board directed that Claude Browne be reinstated in employment. The Board made no order with respect to the amount of compensation and left the matter in the hands of counsel for the parties.

43. On September 2, 1976, the majority of the Board (Mr. Murray dissenting) issued a written direction to the respondent for the reinstatement of Claude Browne. The Board had been informed by the parties that they were unable to agree on any compensation. The majority of the Board now sets forth its decision in that regard:

Having regard to the fact that the complainant did not file a complaint until September 19, 1975, the Board, in the exercise of its discretion, finds that the earliest date for the consideration of compensation must be September 19, 1975. The Board accordingly finds that Claude Browne is entitled to be compensated for loss of earnings in the amount of \$7,675.20.

44. The Board further finds that the evidence does not warrant the issuing of any further direction to the employer.

DECISION OF BOARD MEMBER, F.W. MURRAY

1. I dissent.

2. Having carefully considered all of the evidence, I would find that the Respondent has adduced sufficient evidence for me to conclude that in discharging the Complainant there was no anti-union animus, nor was the Respondent motivated in any way by the Complainant's activities in the discharging of the Complainant.

3. My notes indicate that the Personnel Department, and particularly the Personnel Officer, Neil Scheele and his assistant Evelyn Tashnik, had fallen behind in their job of checking up on employment concerning past employers' names in employment application forms. It was quite clear from the evidence that the Personnel Office had indeed been hiring a large number of employees during the late summer and fall of 1974, and it was because of this inordinately large number of employees hired that this work of telephoning or writing to previous employers had fallen behind.

4. The evidence was that the Company considered this information to be important, primarily because they found it helpful in determining any future assignments for in-plant training programmes.

5. In the process of checking the application forms, it was discovered that none of the former employers listed by the Complainant could be traced, and this matter was reported to the Plant Manager, Thomas McBarron. At the time it was understood that all em-

ployees would be coming into the Personnel Office during the month of January for the purpose of checking income tax forms and accordingly Mr. McBarron instructed the Personnel Department that the matter could keep, and that any further inquiries of Mr. Browne as to his former employers could be delayed until he came in for the annual checking of the income tax forms early in 1975.

6. I conclude from the evidence on this subject that the matter of accumulating information concerning former employers was certainly something less than top priority.

7. My notes indicate that when the Complainant came to the Office in the normal routine of checking income tax forms, he was questioned by Tashnik concerning the information regarding his previous employers as shown on his application for employment form and there is no doubt at that time Browne did not attempt to correct any falsehoods in his application, but only indicated to Tashnik that the firms he named were in Toronto.

8. The evidence concerning the suspension and subsequent dismissal of the Complainant is thoroughly outlined in the Majority Decision and from all of this I would conclude that the matter that "could keep" in December was that concerning the fact that the Company could not locate the Complainant's former employers, and that the matter that had caused the preparation of the suspension notice given to the Complainant on February 18th was the Company's conclusion that the information given in his application form concerning previous employers was totally false.

9. I would further conclude from all of the evidence that the matters and the sole matters that brought about his subsequent dismissal were the Company's knowledge that the Complainant had falsified in all respects his previous employment records in his application for employment form and his insolent and defiant attitude when confronted with this information.

10. While the testimony of Tashnik concerning some of the above matters and the circumstances surrounding the acquisition of back copies of the publication known as "New Canada" would no doubt have been of some value, from the testimony of McBarron and Scheele, I would not conclude that Tashnik went searching in these publications for the purpose of finding further evidence concerning either Browne's past employment or previous or then present connection with the C.W.U. None of such conclusions are to me substantiated by the facts.

11. I would find that the Respondent has discharged the Complainant for the reasons given, and that in the act was not influenced by the Complainant's union activity or support or by an anti-union sentiment and accordingly has met the onus placed upon it under Section 79, (4a) of the Act.

12. I would therefore have dismissed this application.

0302-76-R The Hotel and Club Employees' Union, Local 299, Toronto, Ontario, affiliated with the Hotel and Restaurant Employees' and Bartenders' International Union, (Applicant) v. **Holiday Inn Yorkdale – Commonwealth Holiday Inns of Canada**, (Respondent).

Bargaining Unit – Part-time – Whether Board, when determining whether employee is part-time, will look beyond the standard seven week period where there are extenuating circumstances.

BEFORE: D. H. Kates, Vice Chairman, and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *Douglas J. Wray, G. M. Pineo, Rene Royer, and Jean Guy Belanger for the applicant; D. W. Brady, R. Moore, and S. Smith for the respondent.*

DECISION OF THE BOARD: November 1, 1976

2. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent at the Holiday Inn of Yorkdale of the Commonwealth Holiday Inns of Canada Limited, 3450 Dufferin Street, Toronto, Ontario save and except supervisors, persons above the rank of supervisor, sales and accounting staff, secretaries, security staff, employees regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation periods, constitute a unit of employees of the respondent appropriate for collective bargaining.

3. As a result of the challenges to the respondent's lists at the initial hearing scheduled in this matter, the Board directed a Labour Relations Officer to inquire into and report back to the Board on the lists and composition of the bargaining unit. As a result of that inquiry the parties requested the Registrar to schedule a hearing to entertain their representations with respect to what conclusions the Board ought to draw from the report.

4. A number of employees were challenged because it was argued that they were regularly employed for not more than twenty-four hours per week and, therefore, ought not to be included in the appropriate full time bargaining unit. Upon receiving the Labour Relations Officer's report it was determined that one employee, Karl Krischke was on workman's compensation for approximately three weeks prior to the date the application was filed. In the case of Maria Di Cio it was noted that notwithstanding having been paid for the Good Friday Holiday she was not working on that day and, therefore, the computation of the number of hours worked for that week ought not to include the holiday.

5. In resolving the issue of the part time employee the Board in accordance with the guideline adopted in *The Sydenham District Hospital case* (1967) OLRB M. R. May 135 (at p.137) usually looks to a representative period of seven weeks immediately preceeding the date upon which the application was filed. And once having surveyed the number of hours worked per week over the seven week period the Board makes its finding with respect to the nature of the employee's status. It must be stressed, however, that the seven week period immediately preceeding the application date is only a guideline and not "a hard and fast rule". If that particular period is found to be "unrepresentative" of the nature of employee's status then the Board will simply elect another period of time that is more representative. In short, in instances where within the seven week period an employee is absent from work due to ill-

ness, accident, vacation, holiday, a leave of absence, etc. etc. then that particular week can hardly be considered a relevant period with respect to the application of the guideline. In those instances the Board simply will entertain the parties' representations as to what may constitute a more representative period and as a result thereof will make its computation upon being satisfied of a more accurate reflection of the employee's employment status.

6. As a result and having regard to the representative periods elected by the Board with respect to the employees referred to in paragraph 2 herein, the Board finds that Karl Krischke, and Maria Di Cio are employees regularly employed for more than twenty-four hours per week and, therefore, ought to be included in the bargaining unit. Moreover, the Board notes the respondent's concession that Violet O'Brien, maid, is a part time employee who ought to be excluded from the bargaining unit.

7. The Board further finds that Dianne Murray classified as "a front desk clerk" is an employee in the bargaining unit notwithstanding her temporary assignment to the office for a two week period prior to the application for the purpose of training a new employee to handle the employer's accounts.

8. And the Board further finds that Carlos Carreira assigned to the front desk was not employed on the date the application was filed nor are we satisfied that he was employed a month before the filing of the application with respect to falling within the requirements of the Board's "30 day before, and 30 day after rule". He is, therefore, not to be treated as an employee in the appropriate bargaining unit.

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0723-76-U, 0766-76-U Teamsters Union Local 847, Laundry and Linen Drivers and Industrial Workers, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant), v. **Nalco Boats Manufacturing**, (Respondent).

Discharge for Union Activity – s.79 – Remedy – Whether the Board will order reinstatement where it finds that layoffs would soon have occurred for economic reasons had they not been made in breach of the Act.

BEFORE: M. G. Picher, Vice-Chairman, and Board Members E. Boyer and W. H. Wightman.

APPEARANCES: *Edmund A. Cape, Peter S. Tsachoff, Andrew J. Auld, Michael G. Van Every for the complainant; Rudy Kadikis for the respondent.*

DECISION OF THE BOARD: November 25, 1976.

1. These complaints under section 79 of The Labour Relations Act were heard concurrently by the Board. The complainant alleges that the named grievors, Pete Tsachoff

(Board File No. 0723-76-U) and Andy Auld and Mike Van Every (Board File No. 0766-76-U) were dealt with by the respondent contrary to sections 56, 58 and 61 of The Labour Relations Act.

2.. On the basis of all of the evidence adduced the Board finds the following facts:

- a) The respondent is a boat manufacturer in Scarborough, Ontario, normally employing between three and ten employees and engaged in the production of small aluminum pleasure craft on an order by order basis.
- b) On July 2, 1976 an application for certification was made to this Board for the representation of the employees of the respondent by the complainant union. The respondent received notice of that application on the 5th or 6th of July, 1976.
- c) On the same day that the respondent received notice of the application for certification Mrs. Mindza Kadikis, who along with her husband Rudy Kadikis is a co-owner and manager of the respondent, called five employees, including the three grievors, each in turn into her office.
- d) Each employee was then asked by Mrs. Kadikis whether he had instigated the union application and whether he supported the union. Each replied no to the first question and yes to the second.
- e) Later that day Mr. Kadikis summoned the same employees to the door of the office. It was apparent to all that Mrs. Kadikis, who suffers from angina, apparently brought on by stress, was undergoing a severe attack and having great difficulty in breathing. Mr. Kadikis, obviously agitated, made an emotional statement to the workers to the effect that they were killing his wife.
- f) The following day Mrs. Kadikis summoned the same five employees to her office and advised them that due to a shortage of work three of them must be laid off. As a result the employment of the three grievors was terminated by the 16th of July, 1976, the termination of Mr. Tsachoff being a few days earlier.
- g) At the time of the above events the respondent employer was in a position of serious financial difficulty. The weather of the past summer caused a poor boating season with a resulting backlog in inventory and decline in new orders that caused Mr. and Mrs. Kadikis growing concern. Quite apart from the circumstances surrounding the union's application it was apparent to the employer that cut-backs in production were imminent and sooner or later a lay-off would be necessary.
- h) Since the lay-off in question no other employees have been hired to perform the work of the grievors, and production has been at a standstill. The Board notes the representation of the employer that upon the

resumption of production, which is soon anticipated, the grievors will be recalled.

3. In the light of all of the above circumstances, bearing in mind that the burden in the instant complaint is upon the employer to establish on the balance of probabilities that anti-union motive formed no part of its decision to lay off the grievors, the Board finds that the respondents breached sections 56 and 58 of The Labour Relations Act.

4. The questioning and subsequent laying-off of the employees by Mrs. Kadikis cannot be viewed by this Board other than as an act of interference with, in the words of section 56, "the formation, selection or administration of a trade union or the representation of employees by a trade union". The respondent submitted that section 56 is not breached in so far as the employer's act is nothing more than the exercise of the right to freely express his or her views, absent coercion, intimidation, threats, promises or undue influence. While that is true it should be noted that Mrs. Kadikis was not so concerned with stating her position to the employees as with eliciting information from them about the union's application. The Board accepts the evidence of the grievors that they were intimidated by her line of questioning. That in the face of her questions the employee who first contacted the union denied doing so tends to support the grievors' testimony.

5. The respondent sought to explain its actions by describing for the Board the "parent and child" kind of relationship Mr. and Mrs. Kadikis feel exists between themselves and their employees. They several times referred to the plant as "a family". Their evidence was that Mrs. Kadikis' questions were prompted by a concern to know what was happening in "the family", presumably to know the cause and extent of any discontent.

6. We make no finding as to the motive of Mrs. Kadikis. It is irrelevant. Interference, whether deliberate or inadvertent, whether well-intentioned or ill-intentioned is interference. There is nothing in The Labour Relations Act to suggest an exception for well-intentioned interference. If there were such an exception many a trade union might long since have been killed by kindness.

The words of the Board in *Piggott Motors (1961) Ltd.* 63 CLLC ¶16,264 at p.1129 are appropriate in this context:

"There are certain facts of labour-management relations which this Board has, as a result of its experience in such matters, been compelled to take cognizance. One of those facts is that there are still some employers who, through ignorance or design, so conduct themselves as to deny, abridge or interfere in the rights of their employees to join trade unions of their own choice and to bargain collectively with their employer."

7. We further find that there has been a breach of section 58 of the Act. As was stated by this Board in *The Barrie Examiner* [1975] OLRB Rep. Oct. 745 at 747:

"9. The location of the onus of proof is an important consideration in cases such as this one. The reasons, or reason, behind the discharge of an employee occurring in the context of union activity are best deter-

mined by an examination of the objective circumstances surrounding the discharge. In other words, the circumstantial evidence surrounding the discharge must be examined and inferences drawn from that evidence. There are two competing inferences that can be drawn – either that the discharge was motivated by an anti-union animus or that the discharge was for some reason totally unrelated to the presence of union activity at or around the time of discharge. The Board must determine which of the two inferences is the more probable”.

In the instant cases, the circumstances surrounding the lay-off lead to the more likely conclusion that the presence of the union contributed to the employer’s decision to lay off the grievors. The evidence is that on the same day that the financially beleaguered employer received notice of the union’s organizing campaign it questioned employees in an obvious attempt to discover who inspired and who supported the union drive. The employer showed grave concern over the advent of the union. The day following three of the five employees questioned were given notice that they would be laid off.

8. The most probable inference is that this employer, cognizant of its already over-extended financial position, viewed the looming presence of the union as a further financial liability that it could not then bear. It had already contemplated lay-offs. The added ingredient of the union precipitated its decision to turn the idea of a lay-off into fact. In other words, to paraphrase what was said in *The Barrie Examiner, supra*, at p.749, one of the reasons for the lay-off related to union activity. The lay-off therefore constituted a violation of the Act.

9. Turning to the question of remedy, the Board finds that it cannot, in the circumstances of these cases, simply reinstate the grievors with compensation to the date of reinstatement. That would be in disregard of the facts before us. The lay-off, albeit contrary to the Act, was to some extent a true lay-off and not only a device to defeat the union. It is common ground that the employer has not subsequently hired other employees to do the work of the grievors nor has it resumed production. That part of its motivation for the lay-off relating to the employer’s serious financial difficulty is real and has remained effective to the present time. The Board is satisfied that market conditions would have forced the employer to lay-off the grievors at the least shortly after the time they were in fact laid off. The Labour Relations Act does not intend that we should make orders for compensation that would in effect be a windfall to employees who would otherwise have been without a steady income.

10. That is not to say, however, that the actions of the respondent employer were permissible within the Act. They were not. The actions of the employer were such as to deprive the grievors of the enjoyment of fundamental rights that are theirs under The Labour Relations Act and to deprive the union of its right to freely seek to represent the respondent’s employees. And, what is critical, they were prompted, at least in part, by an anti-union motive.

11. We are not satisfied, on the balance of probabilities, that the grievors would not have enjoyed a somewhat longer period of gainful employment but for the illegal acts of their employer. While there is no reliable evidence before the Board as to exactly when lay-offs would have come absent the respondent’s reaction to the union, and while we recognize

that in such circumstances the assessment of compensation must, of necessity, be something less than the exercise of an exact science, the Board orders that the respondent pay to each of the grievors, Pete Tsachoff, Andy Auld and Mike Van Every one week's wages, based on a normal working week, at the rate of pay at which they were employed at the time of their lay-off.

The Board further orders that immediately upon the resumption of production the respondent recall Pete Tsachoff, Andy Auld and Mike Van Every to the positions they held prior to their lay-off in July of 1976.

The Board remains seized of this matter should there be any dispute between the parties as to the interpretation and implementation of this order.

0241-76-R Labourers' International Union of North America, Local Unionn #493, (Applicant), v. **Winson Construction Limited**, (Respondent), v. Group of Employees, (Objectors).

- and -

0496-76-N Labourers' International Union of North America, Local 493, (Complainant), v. **Winson Construction Limited**, Hans Wintjes and Henry Lavign, (Respondents).

Petition – Certification – s.7(2) – Effect of a petition on the Board's discretion to order a vote.

– s.7a – Whether the union has the onus of showing that a certificate should issue pursuant to s.7a – Whether employer involvement in origination of a petition a violation of the Act that will lead to certification pursuant to s.7a.

BEFORE: Ian C.A. Springate, Vice-Chairman, and Board Members J.D. Bell and O. Hodges.

APPEARANCES: *Thomas Kuttner and David Henri for the applicant/complainant; D.H. Jack for the respondents; no one appearing for the objectors.*

DECISION OF IAN C.A. SPRINGATE, VICE-CHAIRMAN, AND BOARD MEMBER J.D. BELL: November 26, 1976.

1. File 0241-76-R is an application for certification which originally came before a panel of this Board comprised of R.A. Furness, Vice-Chairman, and Board Members J.D. Bell and E. Boyer. By a decision dated June 16, 1976 the Board found a bargaining unit of construction labourers (with certain specific exceptions) employed by the respondent within Board Area 16 (i.e., within a 20-mile radius of the North Bay post office) to be an appropriate unit for collective bargaining and directed the taking of a representation vote. In that the applicant had requested that it be certified pursuant to section 7a of The Labour Relations Act, the Board directed that the ballot box be sealed. With one reservation the parties

on July 22, 1976 agreed to have this panel of the Board, comprised of Ian C.A. Springate, Vice-Chairman, and Board Members J.D. Bell and O. Hodges, hear the evidence with respect to the application of section 7a at the same time as it heard the evidence pertaining to both File 0496-76-U and File 0510-76-U (being an application for consent to institute a prosecution), and to have this panel make a determination with respect to the applicability of section 7a. The reservation agreed to was that this manner of proceeding was without prejudice to the respondent's contention that the applicant by its conduct at the original hearing held on May 24th was now estopped from adducing evidence with respect to the application of section 7a. On July 23, 1976 the original panel issued a decision which stated that the applicant was not, in fact, estopped from adducing evidence with respect to its request to be certified pursuant to section 7a.

2. File 0496-76-U is a complaint filed under section 79 of The Labour Relations Act alleging that the respondents have violated sections 3, 56, 58(c) and 61 of the Act. As noted above, evidence was adduced by the parties with respect to this complaint at the same time as was the evidence relating to the application of section 7a in File 0241-76-R.

3. In all three files the applicant based its case primarily upon the respondents' involvement in the coming into being of two individual employee statements of desire which were actually forwarded to the Board by the respondent employer. This in turn raises forcefully the entire question of the legality of employer involvement in the origination, preparation and circulation of employee statements of desire, as well as the possible affects of that involvement on a trade union's right to certification.

4. The purpose and effect of a statement of desire can only be understood against the background of the procedure by which a trade union establishes its right to certification. (Excluded from this discussion are applications accompanied by a request for a pre-hearing vote as well as those which, if successful, would have the effect of displacing an existing bargaining agent.) In the great majority of cases trade unions file with the Board evidence of membership on behalf of more than fifty-five per cent of the employees in a bargaining unit found to be appropriate by the Board. In such situations the Board, pursuant to section 7(3) of the Act, will generally certify the union outright without requiring the taking of a representation vote. However, despite the fact that automatic certification in such situations is the norm, the Board nevertheless is vested with the discretion under section 7(2) to still order the taking of a representation vote. Where a union fails to file evidence of membership on behalf of more than fifty-five per cent of the employees, then the Board is obliged by section 7(2) to direct the taking off a representation vote. If on the taking of a vote more than fifty per cent of the ballots cast are cast in favor of the trade union then, pursuant to section 7(3), the Board is required to certify the union.

5. Having regard to the above, we now turn to discuss the effect that an employee statement of desire in opposition to a trade union may have on the Board's normal certification procedures. As noted above, where a union files evidence of membership on bargaining unit, the Board retains the discretion to order the taking of a representation vote. The Board is willing to exercise this discretion under certain circumstances where a sufficient number of employees have signed both applications for membership in the union and also a statement of desire in opposition to the union, such that the Board is uncertain as to whether or not as of the terminal date more than fifty-five per cent of the employees in the bargaining unit desire to be represented by the trade union. (See: *The Diebold Company of Canada*

Limited, [1976] OLRB Rep. May 237.) Since as a general principle a union is entitled to be certified upon the filing of evidence of membership on behalf of more than fifty-five per cent of the employees in a bargaining unit, the Board as a general rule is quite reluctant to exercise its discretion and order the taking of a vote. Indeed, it will generally do so only if it has been demonstrated to the Board's satisfaction that the statement of desire clearly represents a true and voluntary expression of employee desires. Further, the Board places the onus of establishing that it is a true and voluntary expression of employees upon the objecting employees themselves. (See: *Trench Electric Limited*, [1976] OLRB Rep. April 167.) Where an employer has been actively involved in the origination, preparation and circulation of the statement, the Board has in the past invariably held that the objecting employees have failed to satisfy that onus. (See, for example, *Alexander Metal Products Co. Ltd.*, [1964] OLRB Rep. April 8.)

6. Employer involvement in the origination, preparation or circulation of an employee statement of desire might have greater implications than merely resulting in the Board declining to order a representation vote on the strength of the statement. Such conduct on the part of an employer may, in fact, also amount to a contravention of the Act. Of particular relevance is section 56 which stipulates that an employer shall not interfere with the selection of a trade union by employees. Under section 79 of the Act the Board has a broad jurisdiction to enquire into any alleged breaches of the Act and also, should it determine that a breach has occurred, to fashion an appropriate remedy. The Board's powers in this regard, however, are remedial only. The Board lacks the authority to actually punish someone for a violation of the Act. That is a matter which is left to a Provincial Court Judge on a prosecution for an alleged violation of the Act. Upon a finding that the Act has been breached, a Provincial Court Judge may levy fines against a corporate employer of up to \$10,000.00 for each offence. Before a prosecution can be undertaken for an alleged violation of the Act, however, the Board must, pursuant to section 90, first grant its consent to the prosecution in writing. Before granting its consent the Board seeks to satisfy itself firstly that issues of fact and law have been raised which may properly be determined by a Provincial Court Judge, and secondly that to grant the consent would further the purposes of sound industrial relations. (See: *The Hydro-Electric Power Commission of Ontario*, [1972] OLRB Rep. June 575.)

7. A finding by the Board that an employer has contravened the Act by his involvement with an employee statement of desire may, in turn, raise the question of the possible applicability of section 7a. Section 7a (which replaces the former section 7(4) - see 1975 S.O., Chapter 76, sections 4(3) and 5) states as follows:

"Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, The Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit."

The effect of applying section 7a is to take an application out of the normal certification procedures. While the full scope of this section has yet to be determined, it appears that its

application may result in a union being certified automatically even though its membership position is such that it would normally be required to win a representation vote before it could be certified. However, before such an event could occur three prerequisites would have to be satisfied. These are firstly that the employer has contravened the Act, secondly that the contravention has resulted in a situation where the true wishes of employees are not likely to be ascertained from the results of the representation vote, and thirdly that the union has, in the opinion of the Board, membership support adequate for the purposes of collective bargaining.

8. The location of the onus where a union is seeking to invoke section 7a so as to take an application out of the normal certification procedure is quite different from the situation where a group of employees is seeking to have the Board conduct a representation vote notwithstanding the filing of evidence of trade union membership evidence on behalf of more than fifty-five per cent of the employees, then the onus rests upon the objecting employees to satisfy the Board that the statement constitutes a true and voluntary expression of the employees who signed it and that therefore the Board should exercise its discretion and direct the taking of a representation vote. However, where a union fails to file evidence of membership on behalf of more than fifty-five per cent of the employees, but is entitled only to have its support tested in a representation vote, the onus lies upon the union seeking automatic certification to demonstrate on the balance of probabilities that the events surrounding the origination and circulation of the statement of desire (and any other events it may be relying on) have resulted in a situation where the true wishes of employees are not likely to be ascertained in a representation vote.

9. In the instant case the evidence establishes that the respondent Hanns Wintjes,, who is the owner and manager of the respondent company; had prepared two identical statements of desire opposing certification of the applicant, and that two employees were asked to read them and decide for themselves whether or not they wanted to sign them. One was asked by the respondent Henry Lavign, who is one of the company's superintendents. The other was asked by Mrs. Sharon Wintjes, the wife and secretary of Mr. Wintjes. As noted above, the respondent employer then forwarded the executed statements of desire to the Board and also referred to them in its reply. Both Mr. and Mrs. Wintjes testified at the hearing and spoke openly of their involvement with the statements of desire. Mr. Wintjes testified that the respondents' actions in connection with the statement of desire were suggested by a local lawyer in North Bay who he had consulted with respect to the application for certification (It should be noted that this was *not* the same lawyer who acted as counsel for the respondent at the hearing.) He stated that the lawyer had given him the wording to be used for the statements of desire and had also advised him to ascertain whether or not the employees would be willing to sign them. Mr. Wintjes also noted that the lawyer warned him that in no event should any coercion or pressure be employed to get employees to sign. It is clear from the evidence that when these events occurred both the respondent employer and the applicant trade union were under the impression that the two employees who signed the statements were the only construction labourers coming within the bargaining unit. It should be noted that a few days before these developments Mr. Lavign had questioned one of the employees as to whether or not he supported the applicant trade union.

10. At a meeting convened by a Labour Relations Officer on May 4, 1976 it was agreed by the parties to the application for certification that as of the date of the application the respondent company in fact employed 4 construction labourers within the bargaining

unit. (By the time of the taking of the representation vote the number of employees in the bargaining unit had risen to 7. The report of the returning officer indicates that all 7 employees cast ballots.) As noted in the Board's decision of June 16, 1976 the applicant filed evidence of membership on behalf of two of the employees in the bargaining unit as of the date of the application, in the normal course the applicant could not be certified by the Board without first winning a representation vote. This in turn meant that the statements of desire could not directly affect the application. However, had the union filed evidence of membership on behalf of more than fifty-five per cent of the employees, we feel confident in stating that based on the past jurisprudence of the Board, the Board would likely have refused to direct the taking of a representation vote. The Board has consistently refused to exercise its discretion and direct the taking of a representation vote where it feels that employees may have been influenced to sign a statement by the actions of management, even if that influence may have been unintentional. (See: *N.J. Spivak Limited*, [1976] OLRB Rep. April 158.) In this case the employer's conduct raises the clear possibility that the two employees may have been influenced. Further, as noted above, the Board has invariably refused to give any weight to a statement of desire where an employer was directly involved in its origination, preparation or circulation. Again we would stress that in assessing a statement of desire for the purpose of determining whether or not it should exercise its discretion and direct the taking of a representation vote pursuant to section 7(2), the Board does not place the onus on a trade union to show why a vote should not be directed. Once a union has filed evidence of membership on behalf of more than fifty-five per cent of the employees in the bargaining unit it has *Prima Facie* established its right to automatic certification. In such a situation it is up to the objecting employees to satisfy the Board that the statement of desire is clearly a voluntary statement reflective of the true wishes of the employees who signed it and that therefore the Board should exercise its discretion and direct the taking of a representation vote.

11. As noted above, an employer's activities in support of a statement of desire may constitute a breach of The Labour Relations Act. In the instant case the applicant contends that the respondents have in fact violated sections 3, 56, 58(c) and 61. Section 3 of the Act, however, is in the nature of a declaration of rights and does not in itself create any offence. (See: *Mrs. Deborah Brown, Mr. Stephen Lewis*, [1976] OLRB Rep. Feb. 4) Thus the complaint in so far as it relates to section 3 of the Act is dismissed. The complaint is also dismissed with respect to the alleged breaches of section 58(c) and section 61. Although one may speculate as to the pressures Mr. Allard and Mr. Raymond may have felt themselves to be under as a result of the respondents' activities, in fact the respondents did not threaten them, did not impose any penalties on them, and did not seek to intimidate or coerce them into refraining from becoming or ceasing to be a member of a trade union.

12. The one remaining section of the Act alleged to have been breached is section 56. It is perhaps worthwhile at this point to set out section 56 in full:

"No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence."

This section seeks to protect the right of an employee to select a trade union free from the interference of his employer. In our view the actions of Mr. Wintjes (with the assistance of Mr. Lavign) in arranging to have his employees sign statements in opposition to the applicant and then forwarding those statements to the Board to be utilized by the Board in its determination of the right of the applicant to be certified constituted such interference. As noted above, no threats, coercion or intimidation was employed to get the employees to sign the statements. However, threats, coercion and intimidation are not elements of an offence under section 56. Mere interference by an employer in the selection of a trade union by employees is sufficient to constitute an offence.

13. Having regard to the above determination, we find and so declare that the respondent Winson Construction Limited, being an employer, and the respondents Hans Wintjes and Henry Lavign being persons acting on behalf of an employer, did contravene section 56 of The Labour Relations Act.

14. Having determined that the respondent company has in fact contravened the Act, we now turn to the question as to whether or not the applicant union is entitled to be certified pursuant to section 7a. As noted above, the onus of demonstrating its right to be certified pursuant to section 7a lies upon a trade union seeking to have it invoked. In the particular circumstances of this case that means that the trade union must satisfy the Board that on the balance of probabilities the true wishes of the employees in the bargaining unit are not likely to be ascertained from the results of the representation vote.

15. No general rules can be set down as to what circumstances might justify a conclusion that employee desires are not likely to be ascertained in a representation vote. Rather, each case must be decided on its own particular facts. In some instances the actions of an employer may be such that a determination that a vote would not be reflective of employee desires may be very easily arrived at. For example, a warning to employees that the certification of a trade union would result in lay-offs and shorter working hours would, lacking any other considerations, tend to have such an intimidating effect that employees might reasonably be expected to refrain from voting for the union no matter what their true feelings about being represented by it. (See: *General Mills Canada Ltd.*, File No. 7411-74-R.) In such a situation to vote in favour of being represented by the trade union might well appear to employees to be tantamount to voting themselves either out of a job or, at best, a drop in pay. However, as one moves away from such relatively clear cut situations, it becomes increasingly more difficult to ascertain whether or not the ability of employees to express their true wishes in a representation vote is likely to be impaired. This is such a difficult case. However, after considerable deliberation, and after a careful review of the testimony of the two employees most directly involved, we have reached the conclusion that on the evidence before us the applicant has failed to demonstrate on the balance of probabilities that the true wishes of employees in the bargaining unit are not likely to be ascertained from the results of the representation vote already conducted. We therefore find that the applicant has failed to establish its right to be certified pursuant to section 7a.

16. As noted above, the applicant did satisfy us that the respondents have violated section 56 of the Act. Therefore, pursuant to our authority under section 79 of the Act, we hereby direct that the respondents Winson Construction Limited, Hans Wintjes and Henry Lavign refrain from interfering with the selection by employees of the complainant trade union.

17. It is perhaps worthy of note that in a separate decision the Board found that issues of law and fact had been raised which might properly be determined by a provincial Court Judge and granted its consent to the applicant to prosecute the respondent company as well as both Mr. Wintjes and Mr. Lavign.

DECISION OF BOARD MEMBER OLIVER HODGES:

1. By denying the applicant trade union and its members the statutory certification available under section 7a of The Labour Relations Act, the majority of this panel appear quite obviously blind to the realities present in this case and insensitive to the latent fear which caused the two workers concerned to deny their union membership. I know of no reason other than fear of reprisal or loss of employment that would cause these workers to lie when their bosses interrogated them concerning union support. Is it reasonable or probable that they took the truth lightly when they said they had no knowledge of the union which they had both joined? I think not. They lied to protect themselves. That is the evidence. There is no other explanation for signing the statements in opposition to the union which their employer had originated, prepared and circulated.

2. A bargaining unit of four was found by the Board. Fifty per cent of that unit were clearly intimidated, threatened and coerced by management, as I understand the evidence. There is just no way that these employees could vote unaffected by the demonstrated resistance of their employer to union representation, resistance demonstrated by the employer's clear violations of the Act.

3. The bargaining unit had increased to seven when the vote was held and the ballot box sealed. But that does not affect the applicant's entitlement to the protection of section 7a as at the date of application. The finding by the majority that the employer violated the letter and spirit of the Act and the logical conclusion which the employees drew from said violation was possible of only one conclusion, namely, that the employees were not free to exercise their rights as guaranteed by the Act and by the Ontario Labour Relations Board.

4. My findings are that the trade union be certified under section 7a, the provision enacted by the Legislature to meet the mischief present in the very circumstances of this case, and that the sealed ballot box be opened and the 7 ballots therein be destroyed without counting.

1543-75-U National Association of Broadcast Employees & Technicians, (Complainant), v. **The Ontario Educational Communications Authority**, ((Respondent)).

Discharge For Union Activity – S79(4a) – Whether anti-union motive – Factors to be considered by the Board in evaluating evidence – Whether respondent has discharged onus – Whether discharge for economic reasons.

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members F.W. Murray and P.J. O’Keeffe.

APPEARANCES: *B. Chercover and Byron Lowe for the applicant; Ronald N. Rudan for the respondent.*

DECISION OF KEVIN M. BURKETT, VICE-CHAIRMAN AND BOARD MEMBER P.J. O’KEEFFE: November 5, 1976.

1. This is a complaint filed under section 79 of the Act alleging that Albert J. Emid and Findlay Sleight, the grievors in this matter, were dealt with by The Ontario Educational Communications Authority (hereinafter referred to as the O.E.C.A.), the respondent in this matter, contrary to the provisions of Sections 58 and 61 of The Labour Relations Act. The complainant requests that the grievors be reinstated in their employment with full compensation.

2. The complainant trade union, the National Association of Broadcast Employees and Technicians (N.A.B.E.T.), applied on October 30, 1974 to be certified as bargaining agent for a group of *producer-directors* in the employ of the respondent. The trade union requested in its application for certification that a pre-hearing representation vote be taken and in a decision dated December 6, 1974 the Board found that the trade union had the required membership support in the bargaining unit for which it sought bargaining rights so as to require the Board to direct that a pre-hearing representation vote be taken. During the course of the preparatory meetings the employer (O.E.C.A.) took the position that all of the persons who fell within the bargaining unit proposed by the trade union exercised managerial functions or were employed in a confidential capacity in matters relating to labour relations pursuant to section 1(3)(b) of the Act. The employer argued in the alternative that the appropriate bargaining unit should be broader in scope than that proposed by the trade union. The O.E.C.A. took the position that the bargaining unit should encompass all of the *project officers*, both the media oriented producer-directors and the educators, in its Educational Media Division, although both types are classified as project officers. The union argued that the educators did not share a sufficient community of interest with the producer-directors. The Board, therefore, in its December 6, 1974 decision, ordered that a vote be taken but that the ballots be segregated. The ballot boxes were then sealed pending the report of The Labour Relations Officer as to both the status of the bargaining unit employees under section 1(3)(b) of the Act and the appropriateness of the proposed bargaining units. It was subsequently agreed that the Labour Relations Officer would issue an interim report dealing with the matter of employee status under section 1(3)(b). His interim report was received by the Board in June, 1975 and, subsequent to hearing the representation of the parties in respect thereof, the Board determined in a decision dated September 16, 1975 that the

persons for whom the trade union sought bargaining rights were employees for purposes of the Act. The parties then agreed that the votes in respect of the bargaining unit sought by the trade union should be counted before the officer commenced hearings with respect to the scope of the appropriate unit. The ballots were counted and in a decision dated October 10, 1975, *approximately one year from the date of the application*, the Board found that not more than fifty per cent of the ballots cast were in favour of the trade union and dismissed the application.

3. The dispute between the parties as to the scope of the bargaining unit, which was not resolved in view of the result of the vote, centered on the inclusion within or exclusion from the bargaining unit of certain, project officers with an "educational" as distinct from a "media" background. The O.E.C.A. decided in 1974 to combine both the media background producer-directors (the group for which N.A.B.E.T. sought bargaining rights) and the so-called educators, within the single classification of Project Officer. It was this reclassification which in large measure precipitated the decision by certain of the producer-directors to seek trade union representation. A group of producer-directors felt that the joining of the producer-directors with the educators within the single classification of Project Officer undermined the authority of the producer-directors and at the same time restricted their job mobility within the media industry. It was put in evidence that whereas the term producer-director is in common usage and connotes a common understanding within the media industry the project officer concept is alien to that industry. It was the thinking of the producer-directors that the introduction of the project officer concept within O.E.C.A. would make it more difficult for them to relocate within the media industry.

4. These concerns found expression within the Association of Producer-Directors which then existed at O.E.C.A. The matter was discussed at a meeting of the Producer-Directors' Association held on July 25, 1974 and after considerable discussion and rephrasing of motions the following motion, which was moved by Findlay Sleight and seconded by Al Emid, (the two grievors in this matter), was passed at that meeting.

"That before August 15th, 1974 the Executive of the PDA approach the Executive of NABET Local 72 and the Directors Guild of Canada with a view of ultimately arranging a joint meeting of the P.D.A., NABET AND DGC with the intention of formulating a set of mutually acceptable definitions relating to a proper and professional working environment which definitions will also encompass job specifications relating to the precise functions of Producers and Directors."

The minutes of the July 25th meeting of the Producers and Directors Association (Exhibit #20) were openly circulated within the O.E.C.A. to all members of the Association.

5. Mr. Sleight testified that he was on holiday from early August to mid-September of 1974 and that upon his return he contacted the president of the N.A.B.E.T. local which represented the production assistants in the employ of the O.E.C.A. and explored with him and the union's National Representative the possibility of N.A.B.E.T. representing the O.E.C.A. producer-directors. He testified that Al Emid assisted him in this regard. A decision was made in late September to attempt to sign into N.A.B.E.T. membership the producer-directors and seek certification before the Ontario Labour Relations Board. Findlay Sleight and A. Emid with assistance from Al Brown, a fellow producer-director and Gathen

James, the local NABET representative, conducted the membership campaign which resulted in the application for certification which was filed on October 30, 1974.

6. The Board is satisfied that the respondent employer was aware of the fact that both Findlay Sleight and Al Emid were actively involved in the attempt by the producer-directors to organize. The evidence with respect to the openness of the campaign and the circulation of the July 25, 1974 minutes support this conclusion and indeed both Dr. R. Keast and Mr. D. Torney, the management persons who terminated the grievors, admitted to their knowledge of the grievors' trade union activity. Dr. Keast testified that he became aware sometime in 1974 that they (the grievors) and others were involved. Mr. Torney admitted in cross-examination that "unofficially" he was aware that both Sleight and Emid were active in the union's organizing campaign. He added that he thought others were involved as well. He did not, however, know the names of any other producer-directors who were active in the union's organizing campaign.

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(Editor's Note: A detailed review of the facts is omitted from this report).

21. The Board has reviewed all of the evidence in this matter and considers it appropriate in this case to set out certain *findings of fact* before proceeding to consider the law and make a determination with respect to the allegations before it. The Board finds that:

- (1) the O.E.C.A. was faced with genuine financial restrictions in the Fall of 1975 which required that fiscal restraint be exercised and which further required that staff levels be reduced;
- (2) the grievors Sleight and Emid were employees of the respondent who were active in bringing about the application for certification which was filed on behalf of the media oriented producer-directors on October 30, 1974;
- (3) the work-related difficulties experienced by the grievors commenced after October 30, 1974;
- (4) Messrs. Keast and Torney, and indeed the management of the Educational Media Division, were aware of the trade union activity of the grievors;
- (5) the grievors were the only project officers assigned to the Educational Media Division who were terminated without prior warning on November 14, 1975.

22. The allegation presently before the Board brings this complaint within the ambit of Section 79(4a) of the Act. Section 79(4a) provides:

"On an inquiry by the Board into a complaint under subsection 4 that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to

his employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization."

The statute recognizes that the reasons for the alleged unlawful activity are within the exclusive knowledge of the employer and places the legal burden upon the employer in a case such as this to prove that it did not contravene the Act.

23. The employer in a section 79 complaint which falls within the ambit of Section 79(4a) is faced with the sometimes difficult task of proving a negative. The employer must prove that it did not violate the Act and in doing so it must establish certain facts on the balance of probabilities. The Board succinctly outlined the extent of the onus in the *Barrie Examiner* case [1975] OLRB Rep. Oct 745, wherein at paragraph 17 the Board stated:

"Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts – first, that the reasons given for the discharge are the only reasons, and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred."

The Board further commented in *The Corporation of the City of London* case [1976] OLRB Rep. Jan. 990 that:

"Simply put, the respondent must put forward a credible explanation free from anti-union motive which is established on the balance of probabilities as the only reason or reasons which precipitated the impugned activity..."

24. The Board in deciding these matters is required to pass judgment on the purity of the employer's motive vis-a-vis the Labour Relations Act. These judgments are often difficult ones to make in so far as employers, are loathe to incriminate themselves and, in so far as trade unions will avail themselves of the protections found in the Act in situations where legitimate terminations are coincidental with trade union organization. The judgments, therefore, require an incisive examination of the evidence and a preparedness by the Board to draw inferences as to the motive for the impugned activity based on the circumstantial evidence before it. The Board in assessing the employer's explanation, must look to all of the circumstances which surround the alleged unlawful acts including the existence of trade union activity and the employer's knowledge of it, the employment history of the grievor and his involvement in trade union activity, unusual or atypical conduct by the employer following upon knowledge of trade union activity, the timing of the termination or other alleged unlawful activity vis-a-vis the employer's knowledge of trade union organization and of course the credibility of the witnesses. (See *National Automatic Vending Co. Ltd.* case 63 CLLC 16,278).

25. The Board must not only be prepared to draw inferences from the circumstantial evidence which is before it but it must also be able to distinguish between the unlawful and the unfair and to "see through" the legitimate reasons which often co-exist with the unlawful. The Board cannot find that an employer who has treated an employee in an unfair man-

ner, even during an organizing campaign, has violated the Act. As the Board stated in the *Fielding Lumber* case [1975] OLRB Rep. Sept. 665 –

“The Board must only be concerned with the motivation of an employer and cannot pass judgment on the fairness of its actions. The Ontario Labour Relations Board has no general mandate to impose its views of fairness on employers and employees. Its sole responsibility is to administer and enforce *The Labour Relations Act* – a piece of legislation that does not stipulate that an employee can be terminated from his employment only for just and reasonable cause. But having said this it must also be observed that in assessing an employer’s declared motivation due regard may be had to the peculiarities of the context surrounding an employer’s actions. To the extent that peculiarities exist and cannot be reasonably explained an employer may fail, by a process of inferential reasoning, to satisfy the burden placed upon it.”

26. Similarly, the Board cannot allow a legitimate reason to mask an anti-union motive. The Board has long held that anti-union motive does not have to be the sole reason or even the predominant reason underlying the activity complained of for the Board to find that the Act has been violated. This approach has received judicial approval in the *Bushnell Decision* [1974] OR (2d) at page 442, affirmed at 4 OR (2d) 288. Accordingly, the Board must be prepared to examine all of the evidence circumstantial and otherwise, for the purpose of drawing inferences as to the credibility of the explanation put forward by the employer and in so doing it must not be unduly swayed by either the co-existence of unfair treatment or by the co-existence of legitimate reasons for the employer’s conduct. (See *Pop Shopp (Toronto) Limited* [1976] OLRB Rep. June 299).

27. The onus which falls to the respondent in this matter is to prove on the balance of probabilities that the discharge of the grievors was in no way related to their trade union activity. The respondent’s explanation for the discharges is that when faced with budget restrictions which necessitated staff reductions, it terminated a number of employees including the grievors, whom the employer had decided were less capable relative to the project officers who were retained. The respondent must satisfy the Board on the balance of probabilities that the reason put forward is the only reason for the discharge, notwithstanding

– its knowledge of the grievors union activity;

– the timing of the work-related difficulties which were experienced by the grievors;

– the coincidence of the two grievors being the only project officers assigned to the Educational Media Division terminated without prior warning that their continued employment was in jeopardy.

28. The Board has reviewed all of the evidence before it, having regard to the factors referred to in paragraph 244 herein and finds that it cannot conclude that the termination of the grievors was without anti-union motive. The evidence does not allow the Board to conclude that the grievors were terminated solely for the reasons given by the employer. When all of the circumstances of this case are considered in light of the material facts as set out in paragraph 21 herein, the Board finds that it is uncertain as to the purity of the employer’s motive for discharging the grievors.

29. The Board has before it evidence which covers a time span in excess of one year. The union alleges that commencing in October of 1974 at or about the time the employer became aware of trade union activity, the grievors were discriminated against because of their trade union activity. The complainant referred to the criticism directed at Findlay Sleigh in respect of his production of the Small Business Series, his stock-footage assignment and his transfer to T.V. Ontario, as evidence of employer discrimination against him which commenced at the time of the employer's first knowledge of trade union activity. Similarly, the union referred to Mr. Emid's difficulties with Globe Theatre and in particular with its host Marlyn Powell who was forced upon him, the withholding of his full merit increase and the suggestions by Dr. Keast that he seek experience elsewhere as like-motivated employer discrimination. The Board accepts that the work related difficulties of the grievors commenced shortly after the employer became aware of their trade union activity. Prior to this time the performance of the grievors had not been criticized and there is no evidence to suggest that either grievor was performing at an unacceptable level. The employer argued, however, that the work related difficulties experienced by the grievors dated from the appointment of Dr. Keast and were the result of his evaluation of their capabilities.

30. Dr. Keast assumed responsibility as director of the open sector, in June of 1974, some four months before the application for certification. Dr. Keast, a highly qualified individual, was given full responsibility for the open sector. There is no doubt in the Board's mind that in the initial period of his appointment Dr. Keast would be assessing his production staff and forming opinions as to the capabilities of those under him. Whereas in some cases the coincidence of the deterioration in the employment relationship of the grievors might assist the Board in drawing an inference unfavourable to the employer, the evidence does not permit the Board to draw such an inference in this case. The timing of the grievors' work related difficulties in the open sector, which the union referred to as anti union discrimination, can be attributed to one of two factors; the advent of the trade union or the advent of Dr. Keast. The timing of the deterioration of the grievors' employment relationship does not of itself support an inference of anti union motive, neither, however, does it lend support to the employer's explanation for the discharges.

31. The evidence as it relates to the Muir Park Hotel meetings which took place on October 21 and November 8, 1974, underscores the difficulty faced by the Board in drawing clear inferences from the circumstantial evidence before it. These meetings, which were the first ever called outside the premises of the O.E.C.A., occurred at or about the time the employer became aware of trade union activity. The complainant union argued that the purpose of the meetings was to intimidate the producer directors and to draw out Findlay Sleigh in his opposition to the project officer approach. The calling of these meetings is also consistent, however, with the appointment of Dr. Keast as director in June of 1974. He would, in the normal course, await the end of the summer vacation season before calling a staff meeting to discuss his plans and expectations for the sector. The timing of these meetings, therefore, while following closely upon the employer's knowledge of trade union activity, is equally consistent with the actions of a newly appointed director. Similarly, although it is clear that the project-officer concept, which was the underlying cause of the decision to seek certification, was a topic of conversation at these meetings, it was also a topic of general interest. The evidence as it relates to the Muir Park meetings does not assist the Board in determining if these meetings were called for the purpose suggested by the union, nor does it assist the Board in determining if they were entirely without an anti union motive.

32. Disregarding the testimony of Messrs. Lopez and Sutherland the Board was satisfied with the candour and credibility of all but two of the remaining witnesses who gave evidence. Unfortunately the two persons whose credibility is a cause of concern to the Board were pivotal players in a scenario which has been unfolded. Findlay Sleigh was confronted in cross-examination with previous statements made by him to the Labour Relations Officer in the course of the Labour Relations Officer's inquiry into the status of the producer-directors, under section 1(3)(b) of the Act. These statements which were admitted to by Mr. Sleigh ran counter to the flavour of Mr. Sleigh's evidence in direct examination with respect to his relationship with Dr. Keast and accordingly raised serious doubts in the Board's mind as to the credibility of Mr. Sleigh. On the other hand, the Board found that Dr. Keast lacked powers of recall in respect of certain important elements of this case to a degree sufficient to call into question his credibility as a witness. Firstly, Dr. Keast could not recall the specifics of his conversation with Mr. Lewis Miller which was referred to by Mr. Miller in his memo of August 20, 1973 (Exhibit 8) wherein he stated:

"Ron Keast has commented to me on the excellence of your work in this series."

Dr. Keast had testified earlier to the effect that Al Emid's promotion was an automatic advancement occasioned by the duration of his upgrade rather than by his performance. Secondly, Dr. Keast did not recall whether he had specifically asked Findlay Sleigh his opinion of the project officer concept at the second Muir Park meeting. Mr. Sleigh testified that Dr. Keast made such an inquiry of him and the union later argued that he did so in order to draw out Mr. Sleigh's affiliation with the union. Thirdly, Dr. Keast could not remember removing Terry Heddan as cameraman on the sixth show of the Small Business series when the evidence establishes that he did and that it was an unusual move. The Board's concern with the credibility of these two witnesses has caused it to be circumspect in the use of their testimony.

33. Notwithstanding the credibility shortcomings noted in the preceding paragraph and the inconclusiveness of the timing of the alleged discriminatory treatment of the grievors, it falls to the Board to assess the evidence as it relates to the genuineness of the employer's claim that the grievors did not measure up relative to their peers. The employer has put before the Board a two-pronged explanation for the terminations; the imposition of fiscal restraint necessitating staff reduction and the consequent termination of certain project officers who were considered less talented than their peers. The Board accepts that the O.E.C.A. was faced with genuine financial restrictions which required that staff levels be reduced. Having regard to the comments as set out in paragraph 26 herein the Board must satisfy itself that fiscal restraint was not used as a vehicle for unlawful conduct. The Board must satisfy itself that the grievors were terminated on the basis of an assessment of their abilities which was not coloured by anti-union bias and for no other reason. Having regard to the comments of the Board as set out in paragraph 25 herein the assessment does not have to be necessarily a fair and reasonable one but only one which has not been coloured by anti union sentiment. In saying this, however, the Board further comments that an assessment which withstands the test of fairness lends credibility to the explanation put forward by the employer.

34. Although the grievors did not work on major productions the objective evidence of their performance during the relevant period is favourable to them. Both grievors met

their budgets and air time deadlines, their productions were aired without alteration and indeed Mr. Emid was assigned to repeat the Globe Theater series and the Experience of Music Series. The nature of the media business as described to the Board, however, is such that creative and artistic talent is assessed on the basis of subjective appreciation and the Board, therefore, ought not to be overly swayed by the objective evidence favourable to the grievors. The bulk of the evidence as it relates to the performance and abilities of the grievors is subjective and as one would expect it is also conflicting. In the face of this type of evidence the Board cannot determine if the employer's assessment of the performance and abilities of the grievors was a fair and reasonable assessment.

35. Notwithstanding the subjective and conflicting nature of the evidence in this regard, the Board is satisfied that Mr. Donn Torney made an assessment of Mr. Sleigh relative to Mrs. Page which was not tainted by anti-union motive. The Board arrived at this conclusion having regard to the reaction of Mr. Sleigh upon being transferred to T.V. Ontario, to the tenure of Mrs. Page in that area and to the suggestion made by Mr. Torney to his immediate supervisor Mr. Leo Lacroix. The evidence establishes that Mr. Torney did not terminate Mr. Sleigh until after he had suggested to Mr. Leo Lacroix, the Assistant General Manager of the Educational Media Division, that Mr. Sleigh be transferred and until after Mr. Lacroix had approved the termination without responding to the suggestion put to him by Mr. Torney. Mr. Lacroix who made the ultimate decision to terminate in the face of Mr. Torney's suggestion of a transfer did not appear to testify.

36. The Board, having regard to the findings of fact as set out in paragraph 21 herein, to the inconclusive nature of much of the circumstantial evidence and to the failure of Mr. Lacroix to testify, is not convinced, on the balance of probabilities, that Mr. Sleigh was terminated solely for reasons unrelated to his trade union activity. Accordingly, the Board finds that the respondent has not satisfied the onus which falls on it in respect of the termination of Mr. Findlay Sleigh.

37. Turning now to Mr. Emid; the Board must be satisfied, on the balance of probabilities, that Dr. Keast's assessment of Mr. Emid was in no way coloured by Mr. Emid's union activity which was known to Dr. Keast. If Dr. Keast's assessment was in any way coloured by Mr. Emid's union activity then, notwithstanding the existence of genuine budget restrictions, his termination must be found to have been in violation of The Labour Relations Act. The only unfavourable evidence before the Board as to the abilities of Mr. Emid vis-a-vis the other project officers is the testimony of Dr. Keast that he did not measure up. The Board has weighed Dr. Keast's evidence in this regard against the evidence favourable to Mr. Emid and has found that it cannot determine, in the circumstances, if Dr. Keast's assessment was a fair and reasonable one. The Board takes this position notwithstanding the latitude afforded Mr. Emid in the selection of Mayvor Moore to host the International Playhouse series, and in the replacement of Mr. Don Daynard as host of the Experience of Music series. In the end result the Board must rely solely upon the testimony of Dr. Keast if it is to find that the termination was for reasons unrelated to trade union activity. In the face of the employer's knowledge of Mr. Emid's trade union activity, and in the face of the coincidence of the termination without prior warning of two project officers who were active in the union, and in the face of circumstantial evidence and evidence as to the abilities of Mr. Emid which is generally equivocal, and in the face of the Board's concern with the credibility of Dr. Keast, the Board must find that it has not been persuaded, on the balance of probabilities, that Mr. Emid was terminated for reasons unrelated to his trade

union activity. The Board must find, therefore, that the respondent has not satisfied the onus which falls to it as set out in paragraph 27 herein in respect of the termination of Mr. A. Emid.

38. Having regard to all of the foregoing the Board directs that the grievors, Findlay Sleigh and Albert J. Emid, be reinstated into the employ of the respondent forthwith and that they be compensated for their lost wages occasioned by their terminations which have been found to be in violation of The Labour Relations Act.

39. The Board will remain seized of this matter in the event the parties are unable to agree on the amount of compensation which is owed the grievors.

DECISION OF BOARD MEMBER F.W. MURRAY:

1. I dissent.

2. I would have found that the terminations of Albert Emid and Findlay Sleigh were the result of budgetary restraints imposed on the Authority by the Ministry of Culture and Recreation, and it follows that I am of the opinion that the Respondent met the requirements of the Act and met the legal burden of proof required of the Respondent under the Act.

3. The Board has concluded that the O.E.C.A. was faced with genuine financial restrictions in the fall of 1975 requiring that fiscal restraint be exercised to a point where staff levels had to be reduced.

4. The evidence was also quite clear that employees were aware of this budgetary restraint programme, and I am of the opinion that it is only reasonable to conclude that those employees who had been, in one way or another advised that their work was something less than satisfactory, including such considerations as being advised to seek outside experience or demotion to a less demanding job, could reasonably consider that their continued employment would be the first to be in jeopardy.

5. Exhibit 4 shows that during the period from October, 1975, to January, 1976, the Ontario Educational Communications Authority decreased its staff complement from 379 to 369. Of these 10 employees, 8 were Project Officers of various grades who either were terminated or resigned, none of whom were replaced.

6. I do not share the doubt expressed in the Majority Decision concerning the credibility of the evidence given by Dr. Keast. On the question of knowledge of Union activity, there is no doubt that Dr. Keast and Mr. Torney were aware that both of the Complainants were active in the Union's organizing campaign. However, my notes show that Mr. Torney knew other Project Officers were also involved in the campaign, but at the date of the Hearing (almost one year after the events), he could not recall their names.

7. Because of the very nature of the work performed by the personnel involved, a dispute of this kind is very difficult for the Board to evaluate. One of the difficulties for example is evaluating the favourable evidence given with respect to the competence and ability of the two Complainants by a number who were either fellow employees or freelance di-

rectors. I would have been more impressed with evidence had it been given by fellow employees employed in the same capacity of Project Officers whose experience with the Complainants would have been more on a continuing day to day co-operative basis. One such person, Mrs. Claudia Page, was called and testified as to the trouble she had in getting Mr. Sleigh to perform routine tasks and his general inability to solve production problems which confronted him.

8. Having found that the Respondent was faced with genuine financial restrictions requiring reduction in staff levels, I would also find that these fiscal restraints were not used either as a vehicle or a veil for unlawful conduct. I could find no evidence of anti-union sentiment and therefore could not conclude that an anti-union sentiment coloured the difficult task of assessment of personnel.

9. I would have found that the Respondent has met the burden of proof imposed upon a Respondent by Section 79, sub-section 4(a) of the Labour Relations Act, and would accordingly have dismissed the application.

1194-76-R Service Employees International Union, Local 204 A.F.L. – C.I.O. – C.L.C., (Applicant), v. **Orillia Nursing Home** (a.k.a. Hannaford Nursing Home) owned and operated by Chadee Holdings Limited, (Respondent).

Certification – Whether the Board will issue separate certificates for full time and part time units where the applicant applied for an all employee unit not distinguishing between full and part time, where no evidence is lead as to the existence of part timers and where the respondent did not file a list or reply and did not appear at the hearing.

BEFORE: M. G. Picher, Vice-Chairman, and Board Members F. D. Kean and P. J. O’Keeffe.

APPEARANCES: *R. Kanter and J. Almeida for the applicant; no one appeared for the respondent.*

DECISION OF THE BOARD: November 4, 1976.

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
3. No reply has been filed by the respondent, nor did the respondent appear at the hearing of October 25th, 1976, although it was given the Board’s usual notice of the hearing. That notice, entitled, “Notice of Application for Certification and Hearing” concludes with the following statement:

“12. If you do not attend at the hearing, the Board may proceed in your absence and you will not be entitled to any further notice in the proceedings”.

This warning flows from section 55 of the Board's Rules of Procedure, which provides:

55(1) The Board may dispose of any application or complaint without further notice to anyone who has not filed a document in the proceedings in the form and manner prescribed by these Rules.

(2) Where a person is served with a notice of hearing by the registrar or is informed of the hearing by posting and fails to appear at the hearing, the Board may dispose of the application or complaint without further notice to the person and without considering any statement filed by him”.

4. The applicant filed a Form 8 or “Declaration Concerning Membership Documents” whereby Mr. Jose Almeida, an Organizer with the applicant union, stated that to the best of his knowledge, information and belief there were 31 persons in the proposed bargaining unit, 29 of whom were shown by supporting documents to be members of the applicant.

5. The bargaining unit proposed by the applicant in its written application was,

“All employees employed by the respondent in Orillia, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, foremen, persons above the rank of supervisor or foreman and office staff”.

6. At the hearing counsel for the applicant amended its application and sought two separate certificates, one for full-time employees and another for part-time employees. His submission was to the effect that “There *may* be one or two part-time employees in the proposed all employee unit” ... (emphasis added). Counsel for the applicant admitted that he had been relying on the anticipated filings of the employer with this Board for more exact information with respect to the breakdown of the employees.

7. In support of his motion he cited *McDonald's Restaurants of Canada Limited* [1973] OLRB Rep. May 287. In that case the Board made the following statement of its practice in the face of requests of this kind:

“At the first hearing the respondent company asked that the Board exclude persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period (hereinafter referred to as the part time employees) from the unit of employees for which the applicant sought certification. It has been the Board's almost consistent practice in situations where a party asks for the exclusion of part time employees to permit the exclusion of those employees from the full time bargaining unit on the basis that the part time employees have a separate community of interests from the full time employees; see e.g. *Brockville General*

Hospital [1967] January OLRB Mthly. Rep. 776 at 777; *Brinks Express Company of Canada Limited* [1970] July OLRB Mthly. Rep. 502; *Children's Aid Society of Sault Ste. Marie & The District of Algoma* [1973] March OLRB R&p. 161; *CSAO National (Inc.)* Board File No. 3170-72-R. However, where there is such an exclusion and an applicant trade union has sufficient membership in the part time bargaining unit which entitles it to a vote or to outright certification, the Board may also order a vote or grant a certificate to the applicant trade union for the part time bargaining unit. The Board does not require an applicant trade union to make a separate application for such a part time bargaining unit merely because the part time employees have been excluded from the full time bargaining unit. It is the Board's view that to cause an applicant trade union to make such an application in these circumstances merely creates a multiplicity of proceedings with the attendant circumstances of delay and cost to all parties involved".

8. There is no question that that statement accurately reflects this Board's normal practice. We are not convinced, however, that that practice is applicable in the circumstances of this case.

9. In cases like *McDonald's* the Board proceeds with evidence before it as to the number of employees in both the full time and part time units and the membership position with respect to each. In the instant application we have the representations of the applicant that the great majority (and possibly all) of the employees are full time, coupled with the uncertain suggestion that there may be one or two part time employees.

10. When an employer fails to file a list of employees in reply to an application for certification and does not appear at the hearing, this Board must necessarily proceed on the basis of the evidence before it. To do otherwise would permit a recalcitrant employer to defeat or delay the collective bargaining process that The Labour Relations Act is intended to promote. This an employer could do by a mere refusal to file a Reply and appear. This Board, therefore, normally proceeds, absent some acceptable justification for the employer's failure to reply or appear, within the terms of the *caveat* expressed in paragraph 12 of the notice quoted in paragraph 3, above.

11. The proceedings, whether or not the employer chooses to participate, are subject to the terms of section 7 of the Act, which provides as follows:

7.(1) Upon an application for certification, the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and the number of employees in the unit who were members of the trade union at such time as is determined under clause j of subsection 2 of section 92.

(2) If the Board is satisfied that not less than 45 per cent and not more than 55 per cent of the employees in the bargaining unit are members of the trade union, the Board shall, and if the Board is satisfied that more than 55 per cent of such employees are members of the trade union, the Board may direct that a representation vote be taken.

(3) If on the taking of a representation vote more than 50 per cent of the ballots cast are cast in favour of the trade union, and in other cases, if the Board is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade union, the Board shall certify the trade union as the bargaining agent of the employees in the bargaining unit.

12. The applicant in the instant case asks this Board to issue separate certificates in respect of full time and part time employees on a speculative basis. This The Labour Relations Act does not permit. To order a representation vote or issue a certificate outright without a vote the Board, under section 7(1) of the Act, must first determine the number of employees in the bargaining unit and next satisfy itself that the membership of the applicant is at least forty-five per cent or fifty-five per cent of that number, respectively. We have no jurisdiction to issue certificates covering employees "if and in so far as they may exist". And that is what the applicant requests.

13. All that we are able to determine on the basis of the material before us is that with respect to the all-employee unit first proposed by the applicant there are 31 employees of whom 29 were members of the applicant union on October 18, 1976, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

14. The union has placed no material or evidence before us on the basis of which we can, within section 7 of the Act, grant its request for certificates for two separate units.

15. There is nothing before us to indicate that such materials or evidence were not available to the applicant through the exercise of normal diligence in the preparation of its application. If an applicant can satisfy the Board that it was for good reasons unable to obtain the information required under section 7, it may prevail upon the Board to endeavour to obtain that information by the appropriate and necessary use of its own statutory powers. (See section 92(2)(a) and (g) of the Act.) The Board is not satisfied that that should be done in the instant case. Here the applicant chose to rely on the anticipated filings of the respondent. When the respondent did not reply the applicant was caught short. A union that seeks a certificate for exclusive bargaining rights for employees before this Board can fairly be expected to do more. It should at the least attempt in good faith to put itself in a position to make representations as to the bargaining unit that would be of the same order of certainty as the signed Declaration Concerning Membership Documents that this Board requires of every applicant. The representations of counsel for the applicant in this case in support of the motion to amend the application to include two bargaining units fall short of even that minimal standard. In *The Kendall Company (Canada) Limited* [1975] OLRB Rep. Aug. 611 at 625 the Board had this to say about that standard:

"It has been held that the Form 8 declarant is obligated to make full and meaningful inquiries to provide himself with sufficient information to sign Form 8 and if he fails to do so in this regard all the membership evidence may be rejected by the Board. (See *National Steel Car Corporation Limited* [1966] OLRB Rep. 738; *Stanley Steel Company Limited* [1972] OLRB Rep. 181)".

16. The Board is unable to issue separate certificates for units of full time and part time employees or an individual certificate for either of them. We can do no more than issue a certificate for the all-employee unit which was originally proposed and for which we have satisfactory evidence.

17. The Board finds that all the employees employed by the respondent in Orillia, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, foremen, persons above the rank of supervisor or foreman and office staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

18. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on the terminal date referred to in paragraph 13, *supra*.

19. A certificate will issue to the applicant.

0077-76-R Labourers' International Union of North America, Local 183, (Applicant), v. **Duron Ontario Limited**, (Respondent), v. The General Contractors' Section of the Toronto Construction Association, (Intervener #1), v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada, (Intervener #2), v. Labourers' International Union of North America, Local 506, (Intervener #3), v. The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Intervener #4).

Bargaining Unit – Representative Vote – Construction Industry – Whether a unit of all cement masons and cement masons' apprentices in industrial, commercial and institutional sector is appropriate for the applicant – S6(1) and (2) – Whether Board will grant applications for craft units pursuant to S6(1) – Whether the Board will allow a non-craft union to displace a craft union as agent for a craft unit.

– Whether the Board will conduct a new vote because certain persons were concerned that the segregated ballot procedure would not preserve the secrecy of their vote – Effect of Applicant sending erroneous note to employees as to time and place of vote.

BEFORE: R. A. Furness, Vice-Chairman, and Board Members J. D. Bell and E. Boyer.

APPEARANCES: *A. M. Minsky, T. Kuttner and M. J. Reilly appearing for the applicant; B. W. Binning and R. Bond appearing for the respondent and intervener #1; Stanley Simpson, William McMynn and C. Migotto appearing for intervener #2; no one appearing for intervener #3 and intervener #4.*

DECISION OF THE BOARD: November 12, 1976.

3. The Board has conducted a pre-hearing representation vote in this matter. The ballot box was sealed at the conclusion of the representation vote and this application was listed for hearing with respect to various issues between the parties. This application is one of eighteen similar applications which involve various combination of issues between the parties. In addition, however, there are certain issues which are common to each of the eighteen applications. The Board deals with all these various issues in this principal decision. The reasons and results set forth in this principal decision apply *mutatis mutandis* to all of the other applications.

4. Various "special" interveners (that is to say those other than intervenor #1 and intervenor #2) attempted to intervene in the majority of these applications. These "special" interveners appeared to have intervened because of varying degrees of general apprehension over the crossing by the applicant of traditional craft lines which exist in the construction industry. None of these "special" interveners claimed either to represent any of the employees who are affected by these application as a bargaining agent. In addition, none of these special interveners either claimed or filed evidence of membership or representation with respect to any of these said employees. After entertaining the representation of the "special" interveners and the other parties, the Board ruled that since these "special" interveners' bargaining rights were fully protected and since they had not established an interest in the proceeding their interventions were dismissed. In this regard reference is made to the *Essex Heath Association* case, OLRB Rep. Feb. 1967, p. 886; *The Board of Hospital Trustees of the City of London* case, OLRB Rep. Aug. 1970, p. 579, 580 and to the *St. Mary's of The Lake Hospital* case, OLRB Rep. Oct. 1968, p. 682, 683.

5. After the dismissal of these "special" interventions the Board proceeded to consider all eighteen applications on the basis of the representations of the applicant, the respondent and interveners #1 and #2.

6. The respondent and interveners #1 and #2 opposed the applicant's request for a bargaining unit of all cement masons and cement masons' apprentices in the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman in the Board's geographic area #8.

7. The applicant characterized the issue with respect to the bargaining unit as the attempted displacement by the applicant of intervenor #2 as the bargaining agent of a unit of cement masons and their apprentices. The applicant conceived its application as falling within the provisions of section 6(1) and not section 6(2) of The Labour Relations Act. The applicant pointed out that no issue had been raised in the material filed with the Board regarding its entitlement to take into membership the employees who are affected by this application.

8. Intervenor #2 argued that by definition the applicant was applying for certification with respect to a craft unit and that accordingly the provisions of section 6(2) are applicable. Intervenor #2 further argued that in this situation the applicant would have to establish that it is the appropriate bargaining agent and that in so doing the attention of the parties would then be directed to section 92(4) of The Labour Relations Act. Intervenor #2 pointed to the Board's recognition of the distinction between the applicant and Local 506 of the Labourers' International Union of North America and added that it was not incumbent upon intervenor #2 to show that the proposed bargaining unit is not appropriate. The re-

spondent and intervener #1 supported the argument of intervener #2 and also alleged that the applicant does not have any jurisdiction to represent employees in the industrial, commercial and institutional sector of the construction industry.

9. At the hearing the Board ruled that in its intervention, intervener #1 raised only the point that Local 506 of the Labourers' International Union of North America has exhaustive bargaining rights in regard to the construction labourers of the respondent. The Board noted that intervener #1 sought to expand its intervention to include reference to cement masons (and, where applicable, waterproofers). The Board ruled that counsel for the respondent and intervener #1 had not alleged any specific provision in the applicant's constitution so as to cause any question to arise under section 92(4) and that even if the Board permitted an amendment to the intervention in question there was neither an issue to which the applicant could respond nor a question which the Board could inquire into. In these circumstances the Board determined that in these circumstances, such fresh allegations would not be entertained by the Board.

10. Intervener #2 argued that since it has a bargaining unit in a section 6(2) situation, such a situation may still be regarded as existing and that the applicant must be regarded as attempting to displace in a section 6(2) situation. Intervener #2 argued that section 6(2) is mandatory and that the Board is required to apply its provision in this application and further argued that if a bargaining unit is appropriate under section 6(2) it is not appropriate under section 6(1). Intervener #1 and the respondent supported the argument of intervener #2. The applicant pointed out examples where the Board had determined "craft" bargaining units for such trade unions as the Christian Labour Association of Canada, the Christian Trade Unions of Canada, the National Council of Canadian Labour, the Lumber and Sawmill Workers, etc., under the provisions of section 6(1) of The Labour Relations Act. The applicant also stressed that there was no evidence before the Board concerning the origin of the bargaining rights of intervener #2 whether by certification or otherwise.

11. The Board ruled at the hearing that the bargaining units for which the applicant was seeking certification were appropriate bargaining units pursuant to section 6(1) of The Labour Relations Act and stated that its reasons would subsequently be given. These reasons now follow. The Board, in applications under the construction industry provisions of The Labour Relations Act, frequently determines bargaining units under section 6(1). Such bargaining units are from time to time expressed in terms of, for example, "carpenters and carpenters' apprentices" or "electricians and electricians' apprentices". In addition, bargaining units which are also expressed in terms of "carpenters and carpenters' apprentices" and "electricians and electricians' apprentices" are also determined by the Board pursuant to section 6(2). The basic approach of the Board in applications for certification under the construction industry provisions of The Labour Relations Act is to determine bargaining units pursuant to section 6(2) where a trade union requests a craft bargaining unit and satisfies the provisions of section 6(2). Where an application is made by a trade union which while able to satisfy the provisions of section 6(2) requests a bargaining unit which is not its craft unit, then the Board considers the appropriateness of the bargaining unit under section 6(1). With respect to section 6(1) in applications under the construction industry provisions, the Board considers that appropriate bargaining units consist of all named trades or classifications which are not represented by a trade union and which are at work on the date of filing.

12. Trade unions such as the Christian Labour Association of Canada, the Christian Trade Unions of Canada, the National Council of Canadian Labour and the Lumber, Saw-mill Workers Union are not craft trade unions and do not satisfy the provisions of section 6(2). The appropriate bargaining units for such trade unions are determined pursuant to section 6(1). In the event that such trade unions apply for certification in situations where an employer has only employees of a particular craft or classification at work on the date of filing, then such trade union is usually granted certification with respect to such particular craft or classification pursuant to section 6(1), for example, "carpenters and carpenters' apprentices" or "electricians and electricians' apprentices". Such bargaining units resemble in description similar craft units which in appropriate situations are determined pursuant to section 6(2). This resemblance, however, is fortuitous and results from an employer having only one craft or classification at work on the date of the filing. In the event that an employer has employees of more than one craft or classification at work on the date of filing, then a trade union which does not satisfy the provisions of section 6(2) is not permitted to selectively seek certification for only one craft or classification, rather the appropriate bargaining unit consists of all unrepresented employees as designated by their craft or classification who were at work on the date of filing in a given geographic area pursuant to section 6(1). Where a bargaining unit has been determined in terms of, for example, "carpenters and carpenters' apprentices" or "electricians and electricians' apprentices", such units are generally appropriate pursuant to section 6(2) with respect to an appropriate craft trade union and are appropriate pursuant to section 6(1) with respect to trade unions which do not satisfy the provisions of section 6(2) where only such crafts are at work on the date of filing.

13. From time to time the set of circumstances which are present in this application are presented to the Board. The Board characterizes this application as a situation where an incumbent craft trade union represents members of a craft – cement masons and cement masons' apprentices – and where some of them have indicated a preference to be represented by another trade union. In these situations, the Board has generally held that the appropriate bargaining unit is the unit in the collective agreement. The unit in the collective agreement is regarded as a displacement unit and is determined with reference to section 6(1) and not section 6(2). Reference is made to the *J. McLeod and Sons Limited* case, OLRB Rep. Dec. 1969, p. 1100 and to the *Canwall Contractors Limited* case OLRB Rep. July 1975 p. 532. If the Board were to accept the argument that in a displacement situation the appropriate bargaining unit is to be determined with reference to section 6(2); this would mean, in many instances, that only an incumbent trade union would possess the necessary requirements to represent a given craft notwithstanding a wish by certain members of that craft to have another trade union represent them in collective bargaining. In our view, under The Labour Relations Act no trade union possesses a monopoly with respect to representing any bargaining unit of employees. In our opinion, the root cause of the arguments over the appropriateness of the bargaining unit is grounded in a view that trade unions in the construction industry should not as a matter of principle cross craft lines in their organizing activities. Many arguments may be made in support of this point of view. Such a point of view, however, is best debated within the ranks of trade unions rather than before the Board.

14. Having regard to the foregoing considerations, the Board finds pursuant to section 6(1) of The Labour Relations Act, that all cement masons and cement masons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and

the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

15. Intervener #1 alleged that the manner in which segregated ballots were dealt with in the pre-hearing votes led voters to believe that their ballots would not be kept secret. Intervener #1 adopted the position that in view of the procedure used by the Board the votes which were conducted were improper. These allegations were made with respect to eight applications. However, at the hearing intervener #1 informed the Board that it was only calling evidence with respect to the instant application and requested that such evidence be applied where appropriate.

16. The evidence on these allegations established that Luigi DalBello, a superintendent with the respondent, was its scrutineer at the representation vote. At the conclusion of the representation vote, Mr. DalBello and the scrutineers for the applicant and intervener #2 signed the following statement:

“We, the undersigned, acted as scrutineers for the parties herein in the conduct of the balloting at the time and place above mentioned. We certify that the balloting was fairly conducted and that all eligible voters were given an opportunity to cast their ballots in secret, and that the ballot box was protected in the interest of a fair and secret vote.”

17. Mr. DalBello testified that some of the ballots were put into a ballot box and that some ballots were treated differently. He then explained the Board's procedure for handling the ballots of those persons whose eligibility to vote has been challenged by one of the parties or whose name does not appear on the list of eligible voters. The witness described the practice which the Returning Officer used in dealing with the ballots of persons whose eligibility to vote has been challenged.

18. At this time, the Board points out that according to the Board's usual practice, such person is instructed to place his ballot inside a white envelope (on which is printed “SECRET BALLOT”) and to seal the white envelope. This person then hands the sealed white envelope to the Returning Officer who places it inside a brown envelope, seals it and writes the name of the person on the outside of the brown envelope so that the secret ballot may be identified and distinguished from other secret ballots. These secret ballots which are referred to as “segregated ballots” by the Board remain in the custody of the Returning Officer and the Board. In the event of a ruling that a given segregated ballot is not to be counted it is ultimately destroyed by the Board. Similarly, where a given segregated ballot is to be counted the Returning Officer removes the white envelope from the brown envelope and discards the brown envelope. The Returning Officer then opens the white envelope and removes the ballot in such a way so as not to reveal the choice expressed thereon (if any) and mixes the ballot with other ballots which are to be counted in such a manner so that the secrecy of the ballot is not revealed.

19. Mr. DalBello informed the Board that about eight of the persons whose eligibility to vote was in question refused to cast ballots and follow the procedure for segregated ballots. They expressed the view that because of the procedure which the Returning Officer proposed to follow (that is to say, the Board's normal procedure) the representation vote

would not be secret and was “crooked”. These persons objected to having their names written on the brown envelopes. The witness stated that this view continued despite assurances by himself in English and Italian that the vote was secret and despite similar assurances from Frank Amis and William McMinn. Mr. DalBello testified that all of the persons whose name were underlined in red (as persons whose right to vote was challenged) on the list of voters eventually cast segregated ballots.

20. William McMinn, an international representative of the Operative Plasterers and Cement Masons’ International Association of the United States and Canada and the emergency trustee of intervener #2, testified that he and Frank Amis attended at the representation vote and that the underlining of the names of persons eligible to cast segregated ballots in red and the writing of names on the brown envelopes caused agitation and distress among some of the members of intervener #2. The witness gave evidence that he assured them that the representation vote was honestly and fairly conducted by the Board. However, after his remarks the members involved referred to the representation vote as “fixed” and “crooked”. While there were individuals who informed Mr. McMinn that they would not cast segregated ballots, the witness did not know whether any or all of them subsequently cast ballots.

21. Intervener #2 made no suggestions concerning how the fears of certain of its members could be allayed on the question of secrecy. The respondent and intervener #1 suggested the use of a system of coding in order to better conceal and protect the names of those who may vote only by means of a segregated ballot. The applicant argued that the Board had followed its normal procedure for dealing with segregated ballots and pointed out that twenty-three of the twenty-six persons whose names appeared on the list of voters cast ballots. The applicant pointed out that in this application a total of eighteen persons cast segregated ballots including twelve persons whose names were underlined in red on the list of voters. In addition, the applicant stressed that the eight persons who declined to vote did not appear on the list of eligible voters and that in this respect since the Board does not know whether they were eligible to vote, the reason for their refusal to vote could well be academic. The applicant pointed out that Mr. DalBello had certified the conduct of the vote and that there was no objection from any employee regarding any irregularity in the voting.

22. Under section 92(2) (f) of The Labour Relations Act, the Board has the power to conduct representation votes and to give directions in connection with the vote as it considers necessary. Under section 43(b) of the Board’s Rules of Procedure, the form of the ballot is settled by the Registrar subject to the terms of the Board’s direction. In our view the procedure of the Board in conducting representation votes and in dealing with segregated ballots is within these sections.

23. There has not been any allegation that in fact the Board’s procedure fails to protect the secrecy of representation votes. In the instant case we have a claim that eight members of intervener #2 regard the representation vote as “fixed” or “crooked”. Such apprehensions, in our opinion, are based upon subjective rather than objective criteria. It appears that these eight members have brought their experiences with voting procedures to Canada and have assumed that such experiences are necessarily valid for the Board’s representation votes. The Board finds no reasonable basis, on the evidence before the Board, to find that the manner in which segregated ballots were dealt with would lead voters to believe that their ballots would not be kept secret. The Board therefore dismisses any request

for conducting a new representation vote on the basis of the manner in which the Board handled the segregated ballots.

24. Counsel for the respondent and intervener #1 proposed a coding system for identifying segregated ballots. While this system may have some merit it still does not solve the problem of dealing with segregated ballots. It will always be necessary to distinguish one segregated ballot from another segregated ballot. Where a coding system is in use it would surely be necessary for the Returning Officer to share the code with the scrutineers so as make it abundantly clear to the parties to a representation vote that there is no confusion or error in ultimately identifying each segregated ballot when the time comes to count or not to count the ballot in question.

25. Intervener #2 filed allegations of improper or irregular conduct against the applicant in connection with the representation vote. More specifically it was alleged that the applicant issued instructions to the eligible voters which were erroneous and confusing in that such instructions did not correctly set forth the time, place and date of the pre-hearing representation votes.

26. In making the arrangements for these representation votes, the Board conferred with the parties concerning the time, date and place of each representation vote. In addition, the Board advised by letter each person whose name appeared on the list of voters of the time, date and place of their respective representation votes. It was not alleged that these letters from the Board were not received by any of these persons. All of the eighteen representation votes were held at various locations on either May 29 or June 5, 1976.

27. The evidence before the Board established that a notice of the applicant's stationery dated May 18, 1976, was mailed to members of intervener #2 who were to be voters in the representation votes. The notice is signed by M. J. Reilly as Vice-President and by M. Mihajlovic and F. Spera as Business Representatives. The notice, which is in English, Italian and Portuguese, sets out the times, dates and places of nineteen representation votes. However, the notice refers to a representation vote respecting Pigott Construction Company Ltd. on June 5, 1976 which was not directed by the Board; the correct time, date and place for representation votes respecting V. K. Mason Construction Ltd. (Board File #0224-76-R) and Vanbots Construction Co. Limited (Board File #0198-76-R) and the incorrect time, dates and places for sixteen other representation votes (including the instant application) which were directed by the Board.

28. The Evidence establishes that Mr. Reilly attended a conference in Quebec City in May of 1976 and that he telephoned a secretary employed by the applicant and gave her instructions for the preparation and mailing of the applicant's notice dated May 18, 1976. The secretary apparently did not correctly carry out the instructions which Mr. Reilly gave her and this resulted in the applicant's notice being essentially incorrect. This notice was mailed out without any check as to its accuracy by either Mr. Reilly or Mr. Mihajlovic or Mr. Spera. This notice came to the attention of Mr. Amis at a time when he was the business manager, financial-secretary treasurer and recording secretary of intervener #2. On May 21, 1976, he caused a notice in English to be mailed to the members of intervener #2. In this notice Mr. Amis corrected the errors which were contained in the applicant's notice of May 18, 1976.

29. The errors in the applicant's notice came to the attention of Mr. Reilly and Mr. Mihajlovic shortly after May 18, 1976. Mr. Mihajlovic was informed by some of the recipients of the applicant's notice that there was a conflict between its notice and the information in the letters which they had received from the Board. He informed them that the Board's notice was correct. Mr. Amis also received inquiries about the notice from intervenor #2 and responded by stating that if the information in intervenor #2's notice corresponded to information which was contained in the Board's letter then intervenor #2's notice was correct. Mr. Mihajlovic, Mr. Spera, Mr. Dominguez, Mr. Tansella, Mr. Ceolin and Mr. Barreiras who are all business representatives of the applicant used a list of intervenor #2's members and called such members and attempted to correct the error which had occurred in the applicant's notice of May 18, 1976. Most of the persons who were contacted by Mr. Mihajlovic had also received a notice from intervenor #2. When Mr. Reilly discovered the error, he instructed the applicant's business representatives who have been referred to in this paragraph to telephone the recipients of the applicant's notice and correct the erroneous information. While approximately ten of intervenor #2's members did not receive the notice dated May 21, 1976, there is no evidence that any of these ten members who may have been entitled to cast ballots in any of the representation votes either did not know the correct time, date and place of the appropriate representation votes or failed to cast ballots. In addition, Mr. Reilly addressed a meeting of between sixty and seventy members on May 23, 1976, and told them to follow the Board's instructions regarding the representation votes.

30. Evidence was introduced with a view to establishing that during the morning of June 5, 1976, when the Board conducted two representation votes at 400 University Avenue, Toronto, approximately one half of the potential voters in all eighteen representation votes or about one hundred persons presented themselves for the purpose of casting ballots. On this occasion less than ten persons were entitled to cast ballots. Gaudenzio Migotto, an acting business agent of intervenor #2, gave evidence that about one hundred persons showed up and requested an opportunity to cast ballots in representation votes other than with respect to Vanbots Construction Co. Limited and V. K. Mason Construction Ltd.

31. On the other hand, Mr. Amis, John Weber, a member of intervenor #2, and Gavino Carboni, a member of intervenor #2, gave evidence which placed the number of persons who attended at 400 University Avenue, Toronto, on the morning of June 5, 1976, at a much lower figure. Mr. Amis gave evidence that there were not more than twenty persons present, Mr. Weber testified that between twelve and fifteen persons were present and Mr. Carboni informed the Board that there were between sixteen and seventeen persons were present.

32. The Board accepts the evidence of these three witnesses on the question of the number of persons who were present in preference to the evidence of Mr. Migotto. Mr. Migotto gave evidence that he knew about seventy-five per cent of the one hundred persons. When pressed to give names he became evasive but did state that Anthony Pede and Arthur Mariano were present. Mr. Pede testified that he was not present at 400 University Avenue, Toronto, on June 5, 1976. The Board finds Mr. Pede to be an entirely credible witness. It appears strange that in the circumstances a witness who claims to know seventy-five persons whom he alleged to be present at a given time incorrectly identifies Mr. Pede as being present. The Board accepts the explanation given by Mr. Amis regarding the number of persons present at 400 University Avenue on the morning of June 5, 1976. Mr. Amis carefully ex-

plained how he arrived at this figure. We accept his evidence regarding the number of employees of Pigott Construction Limited who attended in anticipation of a representation vote. His evidence in this regard is corroborated by the evidence of John Weber. In fact, in the Pigott Construction application, the applicant had insufficient evidence of membership to obtain a representation vote and that application was withdrawn by leave of the Board on June 8, 1976. See the *Pigott Construction Limited* case, Board File 0223-76-R, decision dated June 8, 1976. It was generally (although incorrectly) assumed that a representation vote would be held with respect to Pigott Construction Limited on June 5, 1976. The Board appreciates why such persons would attend on June 5, 1976, in anticipation of casting ballots in a representation vote. By adding the numbers for the various persons who attended at 400 University Avenue, Toronto, on the morning of June 5, 1976, and the explanation of Mr. Amis for their presence, we are satisfied that there was not one person present on that occasion (other than employees of Pigott Construction Limited) who was there to attempt to cast a ballot in a representation vote as a result of being misinformed about the time, date or place of any representation vote.

33. In considering the evidence as a whole, with regard to these eighteen representation votes, the Board finds it remarkable that there was not one employee who gave evidence before the Board that he was misled by the applicant's notice of May 18, 1976, or that he was denied an opportunity to cast a ballot because of any aspect of the applicant's conduct.

34. The Board notes that in any event in some six of these eighteen applications (*K. Mason Construction Ltd.* File No. 0224-76-R; *Vanbots Construction Co. Limited* File No. 0198-76-R, *Belmont Concrete Finishing Co. Limited* File No. 0076-76-R, *Dean-Chandler Waterproofing Limited* File No. 0078-76-R, *Western Waterproofing Company of Canada Limited* File No. 0125-76-R and *Ellis-Don Limited* File No. 0137-76-R) there was a one hundred per cent turnout of voters in these representation votes. Even if an argument could be made for ordering new representation votes in the instant application and eleven others; there can be, in our view, no basis for ordering new representation votes in these six application which have been referred to by name in this paragraph.

35. In our opinion, it is not open to either the respondent or intervener #1 or intervener #2 to allege or for the Board to find that an error by the applicant in its notice of May 18, 1976, in and of itself nullifies eighteen representation votes and requires either the dismissal of this application or the ordering of new representation votes. To so hold would merely be penalizing the applicant for the carelessness of its officers to no useful purpose and to the detriment of the employees who are affected by these eighteen applications.

36. There is a presumption that the Board's representation votes have been fairly conducted unless there is evidence to the contrary. There is no evidence before the Board that anyone who was entitled to cast a ballot in a representation vote and who did not cast a ballot failed to do so because of conduct for which the applicant is responsible. See the *Komoka Nursing Homes Limited* case, OLRB Rep. January 1973 p. 28, 30. There is no basis for a finding that these eighteen representation votes do not reflect the wishes of the employees who are affected by these eighteen applications for certification. See *The Salvation Army Grace Hospital, Windsor*, case, OLRB Rep. November 1965, p. 539, 541.

37. There was a representation before the Board on behalf of intervener #2 that because of uncertainty arising out of its internal elections held in January, 1976, the employees were not in a position to exercise their freedom to vote. More specifically it was urged that because of the uncertainty over the status of the executive new representation votes should be held. There is, indeed, evidence before the Board of turmoil and factionalism within the membership of intervener #2. No doubt intervener #2 would prefer to contest an application for certification in the absence of internal dissension. However, even taking into account the effect of the shifting alliances and the scramble for the allegiance of the employees who are affected by these applications, the Board is of the view that there is nothing in either the evidence or The Labour Relations Act which supports a request for new representation votes. The internal affairs of intervener #2 however disrupting are not matters which may prejudice the rights of a third party such as the applicant in applications for certification.

38. For the foregoing reasons, the Board directs the Registrar to cause the ballots to be counted in each application where there is no dispute concerning any person's eligibility to vote. In any application where there is such a dispute, the Board directs the Registrar to list such applications for hearing by the Board for the purpose of entertaining evidence and representations concerning the eligibility to vote of any person who is still in dispute.

1064-76-R Jim Baxendale & A Group of Employees, (Applicants), v. Teamsters' Local Union No. 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers, (Respondent), v. **Armbro Materials & Construction Ltd.**, (Intervener).

Petition – Termination – Whether blanks in preamble to petition that resulted in name of the union not being set out create a doubt as to the intention of the signators.

BEFORE: M. G. Picher, Vice-Chairman, and Board Members A. Gribben and F. W. Murray.

APPEARANCES: *James Fyshe, Mike Clark, Jim Baxendale and Howard Durrer for the applicants; Douglas J. Wray and Isaac Raymond for the respondent; Daniel Fryzuk and B. Burkart for the intervener.*

DECISION OF THE BOARD: November 10, 1976.

1. This is an application for termination of bargaining rights filed under section 49(2)(a) of the Act.

2. The applicants filed with the Board two petitions bearing a total of 61 signatures. 56 of which correspond to names appearing on lists filed by the employer bearing 63 names. 62 of which the Board finds to represent employees in the bargaining unit on September 22, 1976, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascer-

taining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent union under section 49(3) of the Act.

3. Having regard to the agreement of the parties the Board finds that the bargaining unit for the purposes of this application includes,

All employees of Armbro Materials & Construction Ltd. engaged in the aggregate production operation of the respondent pit in Caledon Township, save and except foremen and dispatchers, persons above the rank of foremen and dispatcher, laboratory technicians, office and sales staff, students employed during the school vacation period and persons covered by a subsisting collective agreement.

4. It appearing from the materials filed that not less than 45 per cent of the employees in the bargaining unit have signified in writing that they no longer wish to be represented by the respondent trade union, the Board made its usual inquiry into the voluntariness of the statements of desire.

5. Given the sensitive nature of employer-employee relations the Board's well established policy in applications of this kind, just as in proceedings respecting statements of objection filed in certification applications, has been to satisfy itself that the statements are freely made and untainted by any direct or indirect employer influence. (*Pigott Motors (1961) Ltd.* [1962] 63 CLLC ¶16,264 at p.1129) The burden is upon the applicants to satisfy the Board of the voluntariness of the petitions filed. In this regard the Board looks to the origination (including both the initiation of the idea for and the physical preparation of the petition) and the circumstances of the circulation of the petition.

6. In this regard section 48 of the Board's Rules of Procedure provides, in part, as follows:

48(1) Evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall not be accepted by the Board on an application for certification or for a declaration terminating bargaining rights unless the evidence is in writing, signed by the employee or each member of a group of employees, as the case may be, and,

(a) is accompanied by,

(i)

the return mailing address of the person who files the evidence, objection or signification, and

(ii)

the name of the employer; and

(b) is filed not later than the terminal date for the application.

(5) The Board may dispose of the application without considering the statement of desire of any employee who fails to appear in person or by a representative and adduce evidence that includes testimony in the personal knowledge and observation of the witness as to,

- (a) the circumstances concerning the origination of the statement of desire; and
- (b) the manner in which each signature on the statement of desire was obtained.

Further, the Board provides applicants under section 47 with a Notice of Hearing that includes the following:

“The applicant will be required to attend the hearing in order to present its case to the Board and to speak to such issues as may arise in connection with this application. Failure of the applicant to appear at the hearing of this case, either in person or through an authorized representative, will result in the rejection by the Board of the application.

It should be noted that any employee or representative who appears at the hearing will be required to testify, or produce a witness or witnesses who will be able to testify from his or their personal knowledge and observation, as to

- (a) the circumstances concerning the origination of the material filed, and
- (b) the manner in which each of the signatures was obtained.”

7. Four persons testified on behalf of the applicants; they are: Mr. Howard Durrer, Mr. Jim Baxendale, Mr. Mike Clark and Mr. Norman Clute, all employees within the bargaining unit at the date of application. Their evidence can be fairly summarized as follows: As a result of a feeling of dissatisfaction among the employees in the bargaining unit and occasional conversations among them expressing that dissatisfaction in May and June of this year, Mike Clark approached another union whose offices are near his home for some guidance as to what could be done. He later suggested to Howard Durrer that he contact that union, which Mr. Clark described as the Oil, Chemical and Atomic Workers. Mr. Durrer did so and was provided with two petition forms, in blank, one each of which he then gave to Mike Clark and Jim Baxendale, who proceeded to obtain and witness thirty-five and twenty-six signatures respectively, between July 9, 1976 and July 15, 1976. Mr. Baxendale and Mr. Clark work on opposite shifts and it appears from the evidence that they obtained the signatures on the job site during working hours, between shifts, on lunch and coffee breaks, in and near such various places as the lunch room, the garage, the sand plant where Mr. Clark worked and at the punch clock. When the signatures were gathered both Mr. Clark and Mr. Baxendale gave their petitions to Norm Clute, the shop steward. He kept them overnight and returned both of them to Mr. Baxendale who then brought them to the union that had first supplied the forms. That union then assisted Mr. Baxendale in bringing this application. The Board is satisfied that there is no hiatus in the circulation and custody of the documents to cloud the instant application.

8. The testimony of all four witnesses was to the effect that although the signatures were obtained on the employer's premises they were obtained discreetly and, to use Mr.

Durrer's words, not "out in the open". The Board is satisfied that the signatures were obtained without the knowledge or approval, express or tacit, of the employer. The employer operates a plant and pit in Caledon Township for the crushing and preparation of construction material. The undisputed evidence is that there were two foremen, one on each shift, and a plant superintendent over-seeing upwards of a total of sixty employees on large premises containing a number of buildings and structures. Coupling these facts with the credibility of the four witnesses for the applicants we are satisfied that the documents filed are untainted by any management influence.

9. During the hearing an issue arose with respect to the sufficiency of form of the statements of desire at the time they were signed. The evidence of Mr. Baxendale, confirmed by that of Mr. Clark, Mr. Clute and Mr. Durrer, is that the preamble to the petition gathered by Mr. Clark was only partly completed at the time the signatures were placed upon it.

10. When Mr. Baxendale obtained the two petition documents they were in blank form. They are each one page whose body consists of three vertical lined columns with the headings: "Members (sic) Signature", "Signature of Witness" and "Date of Signature". Immediately above the columns is a printed preamble with blank spaces, as follows:

"We the undersigned members of Local _____ no longer wish to be represented in Collective Bargaining matters by _____".

11. Mr. Baxendale testified that the document given to him by Mr. Durrer had nothing in the blanks, and that prior to circulating it he printed in by hand the number "230" in the space immediately following the word "Local" and the name "Teamsters Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers" in the space following the word "by". This was not done, however, by Mr. Clark, so that when individual employees signed the petition he circulated it bore the preamble as it appears above in paragraph 10. The blanks in the preamble to that document were filled in by Mr. Baxendale only after it was returned to him by Mr. Clark through Mr. Clute, that is to say, after all of the signatures had been placed upon it.

12. Counsel for the respondent argued that the petition circulated by Mr. Clark should not be accepted by this Board as being sufficient to express the voluntary wishes of those who signed it that they no longer wish to be represented by the respondent union. The outcome of the application turns on this issue. Section 49(3) of the Act requires this Board to determine whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing that they no longer wish to be represented by the respondent trade union. If the Baxendale petition is a sufficient expression for the purposes of that section, and the Clark petition is insufficient, it would appear that no more than 41 per cent of the employees in the bargaining unit have signified to the Board that they no longer wish to be represented by the respondent.

13. Counsel for the applicants makes two arguments in response. Firstly, he urges the Board to find that notwithstanding the blank spaces in the preamble to the Clark petition, at the time of its circulation the words that did appear leave no doubt as to the document's intention and no room for confusion in the mind of any employee who signed it. Alternatively he argues that should the Clark petition be rejected by the Board it should not be rejected in

whole, but should be admissible at least to establish the voluntary written desire of three employees whose names appear on it, namely Mr. Clark, Mr. Durrer and Mr. Clute, all of whom gave *viva voce* testimony before us of their intention when they signed the impugned petition.

14. Counsel for the respondent challenged this second argument, stating that it is this Board's practice not to admit oral evidence to supplement the wording of a written petition in proceedings of this kind.

15. This Board has on numerous occasions in the past addressed itself to deficiencies in the preamble to petitions in both certification and termination proceedings. The Board has rejected petitions in the form of signatures on separate slips of paper later pasted to a page bearing the preamble (*N. D. Applegate Ltd.* [1963] OLRB Rep. May 104); in the form of signatures on sheets of paper that remain separate from the "preamble" or formal statements of intention (*Ray's Haulage Ltd.* [1963] OLRB Rep. Feb. 497 and *Bennett & Wright Limited* [1965] OLRB Rep. Nov. 514); in the form of two sheets of paper where the preamble appears on the first sheet and the second sheet was signed before the first was drafted and attached to it (*Presland Iron & Steel Ltd.* [1966] OLRB Rep. 817); in the form of one or more pages where the signatures were placed upon them prior to the inserting of the preamble (*DeVilbiss (Canada) Ltd. (Barrie)* [1960] OLRB Rep. Nov. 285) (*Boyle-Midway (Canada) Limited* [1966] OLRB Rep. Dec. 697); (*Francon Ltd. Ottawa* [1970] OLRB April 71 and *Arbo Leather Co. Ltd.* [1970] OLRB Nov. 855); where the wording of the preamble gives rise to confusion between the local and the international union (*Patrick McKeon and Other Employees of Hiram Walker & Sons Limited* [1973] OLRB Rep. Nov. 603); where at the time of circulation the petition bore only a preliminary sentence that the applicant was the signatories representative and the preamble was inserted later (*Wilson-Munroe Company Ltd.* [1973] OLRB Rep. 647); where some signatures were obtained prior to the insertion of the preamble and some after and the evidence was unreliable as to the precise point in time when the preamble was inserted (*U.B.A. Chemical Industries Limited* [1975] OLRB Rep. Mar. 198).

16. While our research was not exhaustive, the earliest decision we have found where this Board discussed the principles applicable with respect to the sufficiency of a preamble is *Ever-Bright Limited (Metropolitan Toronto)* [1956] of employees filed in opposition to an application for certification and had this to say:

"One of the documents filed contains 41 signatures. ... The document is headed 'Employees Association'. There is nothing on the document other than the heading and the signatures. It is clear from the evidence that there is in fact no employees' association in existence in the respondent's plant. There is no evidence as to what the persons whose names appear on this document thought the purposes or objects of the association would be or ought to be. There is, in short, little or no reason for drawing any inference whatsoever from this document as to what was the intention of the persons who signed it other than, perhaps, that if any association of some kind was formed they might be interested in joining it. It is significant that none of the persons who appeared in person at the hearing to oppose the application signed this particular document.

In view of the above circumstances, the Board is not prepared to say that the mere fact that a person has signed such a document is consistent only with opposition to the present application. Having regard to all the evidence before it, the Board is satisfied that this document does not materially lessen the weight of the membership evidence filed by the applicant."

17. The minimal test adopted in *Ever-Bright* and in all of the cases cited above is for the Board to ask itself whether the wording and form of the document at the time the employees signed it were such as to make the intention and purpose of the document clear and unequivocal in the minds of the persons signing.

18. By requiring through section 49(3) of the Act that the expression of the desire of employees to be no longer represented by a trade union must be in writing the Legislature has recognized the importance of this aspect of the labour relations process. The vesting and divesting of exclusive bargaining rights, so fundamental to that process, are not to be taken lightly. The imposition of certain minimal formal requirements therefore provides a greater measure of certainty to both the employees whose wishes are expressed and to the Board which is called upon to assess and give effect to those wishes.

19. In the instant case the persons whose names appear on the Clark petition signed a document that had a preamble which could be reduced to, "We the undersigned members of Local no longer wish to be represented in Collective Bargaining matters" or "We the undersigned no longer wish to be represented in Collective Bargaining matters".

20. It is difficult to see how such a preamble could cause confusion or uncertainty in the mind of those who placed their signature under it. There is no evidence that any other union but the respondent represented these employees in collective bargaining matters. Indeed, under The Labour Relations Act there could not be. Nor is there any evidence of a contemporaneous organizing campaign by a rival union. In *Francon Ltd. Ottawa* the Board stated:

"Before a document will be acceptable evidence of ... signification by a person that he no longer wishes to be represented by a trade union, the intent of the person signing must be clear from the face of the document at the time the document was signed".

The Board finds that the statement of desire circulated by Mr. Clark satisfies that test and that all of the signatures upon it are admissible to establish the wishes of those who signed it that they no longer wish to be represented by the respondent.

21. This decision makes it unnecessary for the Board to deal with the applicant's alternative submission that any ambiguity in the wording of the preamble to that petition is resolved by the *viva voce* evidence of three of its signatories. In this regard, however, the Board notes its recent decision in *Genwood Industries Ltd.* [1976] OLRB Rep. Aug. 417 where a preliminary motion to dismiss a section 49 petition for insufficiency of language was denied. In that case the Board was unwilling, on that basis alone, to reject a petition whose wording, although somewhat ambiguous, could support a reasonable inference that its signatories wanted to be rid of the union. Although that petition was rejected on other grounds, the Board held that the words appearing in the preamble of a petition are but part

of the evidence to be weighed in assessing whether the petition is the voluntary written expression of the employees that they no longer wish to be represented by the union at the time that they placed their signatures upon it.

The Board reasoned, in part, as follows:

“The right of a group of employees to bring their written wishes before the Labour Relations Board cannot be made to depend strictly upon the choice of words made by persons who may be uninitiated in the niceties of pleading. Frequently, as here, petitions of this kind are drafted by rank and file workmen of limited writing ability and without the assistance of legal counsel. To adopt the legalistic approach suggested would be unrealistic and would frustrate the intention of the Act”.

• • •

(editor's note; the Board proceeded to order a vote.)

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING OCTOBER 1976

Applications for Certification

BARGAINING AGENTS CERTIFIED DURING OCTOBER

No Vote Conducted

0431-75-R: Retail Clerks Union, Local 486 (Applicant) v. Tip Top Meat Market Limited (Respondent) v. Employee (Objector).

Unit: "all employees of Tip Top Meat Market Limited in the Townships of Nepean and Gloucester, save and except Assistant Store Managers, Store Managers and persons above the rank of Store Manager." (15 employees in the unit).

1223-75-R: International Brotherhood of Painters and Allied Trades Local Union 1891 (Applicant) v. Toronto Drywall Services (Respondent) v. Group of Employees (Objectors).

Unit: "all painters and painters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit). (*clarity note* – see Report of full decision [1976] OLRB Rep. October).

Editors Note: 1695-75-R, 1737-75-R, 1738-75-R, 1739-75-R, 1741-75-R, and 1742-75-R were incorrectly reported as certified in the listing for March, 1976.

1695-75-R: International Molders & Allied Workers Union (Applicant) v. Union Electric Supply Co. Limited (Respondent).

Unit #1: "all employees of the respondent situate at 1491 Castlefield Avenue, Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (57 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent situate at 1770 Midland Avenue, Scarborough, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (7 employees in the unit). (*Having regard to the agreement of the parties*).

1737-75-R: International Molders & Allied Workers Union (Applicant) v. Goodwill Electric Supplies Limited (Respondent).

Unit: "all employees of the respondent at Simcoe, save and except foremen, persons above the rank of foreman and office and sales staff." (3 employees in the unit).

1738-75-R: International Molders & Allied Workers Union (Applicant) v. Goodwill Electric Supplies Limited (Respondent).

Unit: "all employees at Guelph, save and except foremen, persons above the rank of foreman and office and sales staff." (3 employees in the unit).

1739-75-R: International Molders & Allied Workers Union (Applicant) v. Goodwill Electric Supplies Limited (Respondent).

Unit: "all employees of the respondent at Brantford, save and except foremen, persons above the rank of foreman and office and sales staff." (7 employees in the unit).

1741-75-R: International Molders & Allied Workers Union (Applicant) v. Goodwill Electric Supplies Limited (Respondent).

Unit: "all employees of the respondent at Niagara Falls, save and except foremen, persons above the rank of foreman and office and sales staff." (4 employees in the unit).

1742-75-R: International Molders & Allied Workers Union (Applicant) v. Union Electric Supply Co. Limited (Respondent).

Unit: "all employees of the respondent at Kitchener, save and except foremen, persons above the rank of foreman and office and sales staff." (5 employees in the unit).

1743-75-R: International Molders & Allied Workers Union (Applicant) v. Union Electric Supply Co. Limited (Respondent).

Unit #1: "all employees of the respondent at Rennie Street, Hamilton, save and except foremen, persons above the rank of foremen and office and sales staff, (hereinafter referred to as bargaining unit #1)." (12 employees in the unit).

Unit #2: "all employees of the respondent at Walnut Street North, Hamilton, save and except foremen, persons above the rank of foremen and office and sales staff, (hereinafter referred to as bargaining unit #2)." (3 employees in the unit).

1744-75-R: International Molders and Allied Workers Union (Applicant) v. Union Electric Supply Co. Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Mississauga, save and except foremen, persons above the rank of foreman and office and sales staff." (4 employees in the unit).

1842-75-R: International Molders & Allied Workers Union (Applicant) v. Union Electric Supply Co. Limited (Respondent).

Unit: "all employees of the respondent at St. Catharines, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (5 employees in the unit). (*Having regard to the agreement of the parties*).

0448-76-R: Labourers International Union of North America, Local 607 (Applicant) v. B & B Enterprises (Respondent).

Unit: "all construction labourers, bricklayers and bricklayers' apprentices in the employ of the respondent working in the District of Rainy River, save and except non-working foremen and persons above the rank of non-working foreman." (14 employees in the unit).

0467-76-R: Ontario Nurses' Association (Applicant) v. Chapleau General Hospital (Respondent).

Unit: "all registered and graduate nurses engaged in a nursing capacity employed at the Chapleau General Hospital, Chapleau, Ontario, save and except Supervisors, persons above the rank of Supervisor and persons employed for not more than twenty four (24) hours per week." (22 employees in the unit).

0475-76-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. Belanger Construction Ltd., and B & B Enterprises (Respondents).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondents in the District of Rainy River, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0704-76-R: United Brotherhood of Carpenters & Joiners of America, Local Union 2737 (Applicant) v. Davis Lumber Company Ltd. (Respondent).

Unit: "all full-time employees of the respondent employed at its retail store in St. Catharines, Ontario save and except assistant manager, persons above the rank of assistant manager, office, clerical and wholesale staff, students employed during the school vacation period, and persons regularly employed for not more than twenty-four hours per week." (4 employees in the unit). (*Having regard to the agreement of the parties*).

0788-76-R: Labourers' International Union of North America, Local 183 (Applicant) v. York Condominium Corporation #165 (Respondent).

Unit: "all employees of the respondent at 10 Edgehill Golfway, in Metropolitan Toronto engaged in cleaning and maintenance, save and except supervisor, persons above the rank of supervisor, office and clerical staff." (no employees in the unit). (*Having regard to the agreement of the parties*).

0894-76-R: Labourers' International Union of North America Local Union 493 (Applicant) v. Kona Builders Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent within the township of Bucke and the adjacent townships thereto, which are Dymond, Hudson, First Brook, Coleman, and Lorraine, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in the unit).

0948-76-R: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. A. R. King Company Limited (Respondent).

Unit: "all electricians and electricians' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

0956-76-R: Amalgamated Clothing and Textile Workers Union (Applicant) v. James B. McGregor-Division of Toby Industries Limited (Respondent).

Unit: "all employees of the James B. McGregor Division of the respondent in Metropolitan Toronto, save and except foremen, those above the rank of foremen, office and sales staff, students employed in the school vacation year and employees who regularly work not more than 24 hours a week." (81 employees in the unit). (*Having regard to the agreement of the parties*).

0970-76-R: Amalgamated Clothing and Textile Workers Union (Applicant) v. Textral Fibres Limited (Respondent).

Unit: "all the employees of the respondent in Goderich, Ontario, save and except foremen, foreladies and persons above the rank of foreman, forelady, supervisors, sales and office staff." (42 employees in the unit). (*Having regard to the agreement of the parties*).

0996-76-R: Labourers' International Union of North America, Local 183 (Applicant) v. Whitehall Development Corporation Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, employed on residential construction, save and except construction labourers employed as Helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman." (16 employees in the unit).

1020-76-R: Labourers' International Union of North America, Local 183 (Applicant) v. Helder Holdings Ltd. (Respondent).

Unit: "all construction labourers of the respondent employed on residential construction, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foreman working in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario." (3 employees in the unit).

1022-76-R: Service Employees Union Local 268 Affiliated with the SEIU A.F. of L., C.I.O., C.L.C. (Applicant) v. The General Hospital of Port Arthur (Respondent).

Unit: "all office and clerical employees of The General Hospital of Port Arthur in the City of Thunder Bay save and except supervisors, persons above the rank of Supervisor, confidential secretary to the Administrator, confidential secretary to the Assistant Administrator, confidential secretary to the Director of Nursing Service, confidential secretary to the Director of Personnel and Labour Relations, clerk employed in a confidential capacity in the office of the Director of Personnel and Labour Relations, confidential payroll clerk, technical personnel, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period or on a co-operative work-study programme and persons covered by subsisting collective agreements." (57 employees in the unit).

1060-75-R: Teamsters Union Local 879, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Anderson-Thomas Limited (Respondent).

Unit: "all employees of the respondent working at and out of Hamilton, Ontario save and except foremen, those above the rank of foreman, office and sales staff." (7 employees in the unit).

1061-76-R: Upholsterers International Union of North America AFL CIO (Applicant) v. Edgewood Furniture Limited (Respondent).

Unit: "all 3 employees of the respondent at 135 Ormont Drive (units 12-20) Weston, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (21 employees in the unit). (*Having regard to the agreement of the parties*).

1071-76-R: Canadian Union of Public Employees (Applicant) v. The Cobourg Parks and Recreation Board (Respondent).

Unit: "all service or maintenance employees of the respondent in Cobourg, Ontario, save and except foremen, persons above the rank of foreman, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period." (5 employees in the unit).

1091-76-R: Labourers' International Union of North America, Local 183 (Applicant) v. Sterval Company Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, The Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

1100-76-R: Labourers' International Union of North America, Local No. 1059 (Applicant) v. Gold and Gold Recycling Industries Inc. (Respondent).

Unit: "all employees of the respondent employed at 555 Bathurst Street, London, Ontario, save and except foremen, persons above the rank of foreman, supervisors, office and sales staff and persons regularly employed for not more than twenty-four hours per week." (8 employees in the unit). (*Having regard to the agreement of the parties*).

1101-76-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1963, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Skyway Equipment Co. (Respondent) v. International Association of Bridge, Structural & Ornamental Iron Workers Local 721 (Intervener).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1103-76-R: The Federation of Community Agency Staffs (Applicant) v. Big Sister Association of Metropolitan Toronto (Respondent).

Unit: "all employees of the respondent employed at its facilities known as Huntley Youth Services in Metropolitan Toronto, save and except house directors, supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (31 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note* – see Report of full decision [1976] OLRB Rep. October).

1114-76-R: Amalgamated Meat Cutters and Butcher Workmen of North America, A.F.L., C.I.O., C.L.C. (Applicant) v. Canadian Abattoir Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (55 employees in the unit).

1115-776-R: Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Northumberland Ready-Mix Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent company working at Hastings, Ontario, the County of Northumberland, save and except foremen, those above the rank of foreman, office and sales staff." (4 employees in the unit).

1119-76-R: International Union of Operating Engineers, Local 793 (Applicant) v. En-San Contractors Ltd. (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit).

1120-76-R: Christian Labour Association of Canada (Applicant) v. Group 49 Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*Having regard to the foregoing*).

1121-76-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. (Applicant) v. Canadian Cold Forging and Coining Company Limited (Respondent).

Unit: "all employees of the respondent in Windsor, Ontario save and except foremen, those above the rank of foreman, office and sales staff and persons regularly employed for not more than 24 hours per week." (16 employees in the unit). (*Having regard to the agreement of the parties*).

1122-76-R: The Canadian Union of Public Employees (Applicant) v. Rest Haven Nursing Homes of St. Williams (1974) Limited (Respondent).

Unit: "all employees employed by the respondent at its nursing home in St. Williams, Ontario, save and except professional medical staff, registered and graduate nurses, undergraduate nurses, administrator, supervisor, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (19 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note – see Report of full decision [1976] OLRB Rep. October*).

1132-76-R: Teamsters, Chauffeurs, Warehousemen & Helpers Union Local 91, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Willson Office Specialty Ltd. (Respondent).

Unit: "all employees of the respondent at its warehouse in Ottawa, Ontario, save and except foremen, those above the rank of foreman, office and sales staff, persons employed in its retail sales store, trainee sales and customer service personnel, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (13 employees in the unit). (*Having regard to the agreement of the parties*).

1133-76-R: London and District Service Workers Union, Local 220, S.E.I.U. (Applicant) v. Central Park Lodge of Canada Ltd. (Respondent).

Unit: "all employees of Central Park Lodge of Canada Ltd. at London regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors and foremen, persons above the rank of supervisor and foreman, office staff, professional nursing staff, physiotherapists, occupational therapists and employees covered under subsisting collective agreements." (8 employees in the unit). (*Having regard to the agreement of the parties*).

1135-76-R: Labourers' International Union of North America, Local 527 (Applicant) v. Moffatt Construction and Materials Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa – Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (30 employees in the unit).

1136-76-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Murphy Tobacco Limited (Brantford Branch) (Respondent).

Unit: "all employees of the respondent at Brantford, save and except foremen, persons above the rank of foreman, office and sales staff." (11 employees in the unit).

1140-76-R: United Steelworkers of America (Applicant) v. IKO Industries Ltd. (Respondent).

Unit: "all employees of the respondent at its plant in Hawkesbury, Ontario, save and except sales staff, office staff, lab technicians, foremen, persons above the rank of foreman, employees regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (20 employees in the unit). (*Having regard to the agreement of the parties*).

1145-76-R: Labourers' International Union of North America, Local 183 (Applicant) v. Kingslake Park Developments Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, employed on residential construction, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman." (7 employees in the unit).

1146-76-R: Labourers' International Union of North America Local 491 (Applicant) v. Breton Construction (Respondent).

Unit: "all construction labourers in the employ of the respondent within a fifty mile radius of the Timmins Federal Building, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

1152-76-R: United Steelworkers of America (Applicant) v. Union Miniere Explorations and Mining Corporation Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all office, clerical and technical employees of the respondent in the Township of Ponsford in the District of Kenora (Patricia portion) save and except supervisors, persons above the rank of supervisor, one confidential secretary to each of the personnel superintendent and the mine manager, students employed during the school vacation period, students in the Waterloo University co-operative program who are employed by the respondent, and persons covered by the decision and certifi-

cate of the Ontario Labour Relations Board both of which are dated July 21, 1976." (30 employees in the unit). (*Having regard to the agreement of the parties*).

1155-76-R: Canadian Union of Public Employees (Applicant) v. VS Services Ltd. (Respondent).

Unit: "all employees of the respondent at Barton Place Nursing Home in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, chef, dietitian, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (27 employees in the unit).

1163-76-R: International Union of Operating Engineers, Local 793 (Applicant) v. Wasero Construction Ltd. (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

1164-76-R: Labourers' International Union of North America, Local 183 (Applicant) v. E. H. Rickert Associates Inc. Sewer & Watermain (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit).

1165-76-R: Labourers' International Union of North America, Local 183 (Applicant) v. Duro Forming Company Limited (Respondent).

Unit: "all employees of the respondent engaged in concrete forming on residential building projects in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (16 employees in the unit).

1166-76-R: United Steelworkers of America (Applicant) v. Harter Furniture Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Guelph, Ontario save and except foremen, persons above the rank of foreman, office and sales staff." (85 employees in the unit). (*Having regard to the agreement of the parties*).

1170-76-R: United Electrical, Radio and Machine Workers of America (UE) (Applicant) v. Formold Plastics of Canada Ltd. (Respondent).

Unit: "all employees of the respondent at Richmond Hill, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (131 employees in the unit).

1174-76-R: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. North Rim Construction Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent within a radius of thirty-five miles from the City of Sudbury Federal Building, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

1175-76-R: Labourers' International Union of North America, Local 607 (Applicant) v. Babcock & Wilcox Refractories Limited (Respondent) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (Intervener).

Unit: "all construction labourers in the employ of the respondent in the townships of Alexandra, Webster, Beniah, Haggart, Kendrey, Colquhoun, Sydere, Bradburn and Calder in the District of Cochrane, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

1178-76-R: Canadian Paperworkers Union (Applicant) v. Planet Paper Box Ltd. (Respondent).

Unit: "all employees of the respondent in the Township of Vaughn, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (17 employees in the unit). (*Having regard to the agreement of the parties*).

1186-76-R: Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Roadwin Contracting Limited (Respondent).

Unit: "all construction labourers employed by the respondent in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman." (9 employees in the unit). (*clarity note* – Report of full decision [1976] OLRB Rep. October).

1187-76-R: Office and Professional Employees International Union (Applicant) v. CUNA of Ontario Credit Union Limited (Respondent).

Unit: "all clerical employees of the respondent at Burlington, Ontario, who are regularly employed for not more than 24 hours per week." (5 employees in the unit).

1201-76-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers (Applicant) v. Coca-Cola Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at its plant in Ottawa, Ontario, save and except office staff, sales supervisors, foremen and persons above the rank of sales supervisor and foreman." (200 employees in the unit). (*Having regard to the agreement of the parties*).

1207-76-R: Canadian Union of Public Employees (Applicant) v. Children's Aid Society, District of Muskoka (Respondent) v. Employee (Objector).

Unit: "all employees of the respondent at Bracebridge, save and except supervisor, persons above the rank of supervisor and office staff." (13 employees in the unit). (*clarity note* – see Report of full decision [1976] OLRB Rep. October).

1209-76-R: Canadian Union of Public Employees (Applicant) v. Geri-Care Nursing Homes of Canada Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Palmerston in its home for the aged, save and except professional medical staff, graduate nurses, undergraduate nurses, graduate pharmacists, graduate dietitians, supervisors, and persons above the rank of supervisor." (32 employees in the unit). (*Having regard to the agreement of the parties*).

1210-76-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Applicant) v. Thorco Manufacturing Limited (Respondent).

Unit: "all employees of the respondent in Brampton, save and except foremen, persons above the rank of foreman, office and sales staff." (33 employees in the unit).

1216-76-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. (Applicant) v. Tri-County Tube Corporation Limited (Respondent).

Unit: "all employees of the respondent in Bothwell, save and except foremen, persons above the rank of foreman, office and sales staff." (28 employees in the unit).

1262-76-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1963, 3227, and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Canbar Products Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1265-76-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1963, 3227, and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Industrial Concrete Forming Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

Applications Certified Subsequent to Pre-Hearing Vote

0942-76-R: Communications Workers of Canada (CLC) (Applicant) v. The Academy of Medicine, Toronto Call Answering Service (Respondent).

Unit: "all employees of the respondent in its Call Answering Service Division, save and except Manager, persons above the rank of Manager, and Office Staff." (23 employees in the unit).

Number of names of persons on list as originally prepared by employer		24
Number of persons who cast ballots		22
Number of ballots marked in favour of applicant	12	
Number of Ballots marked against applicant	10	

0959-76-R: Canadian Chemical Workers Union (Applicant) v. Canada Metal Company Limited, Metal Powder Division and Roto-Cast Limited (Respondent) v. Local 453 International Chemical Workers Union (Intervener).

Unit: "all employees of the respondent in Toronto and Oakville save and except watchmen, guards, foremen, general foremen, superintendents, supervisors, technical and office employees, and those employees included in the bargaining group of Local 872, United Association of Journey-men and Apprentices of the Plumbing and Pipe Fitting Industry." (182 employees in the unit). (*Having regard to the agreement of the parties*). (clarity note – see Report of full decision [1976] OLRB Rep. October).

Number of names of persons on revised voters' list	179
Number of persons who cast ballots	151
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	94
Number of ballots marked in favour of intervener	55

1025-76-R: Canadian Food and Allied Workers, chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America (Applicant) v. National Nut and Confection Company Division of Wander Limited (Respondent).

Unit: "all employees of the respondent at its plant in Peterborough, Ontario, save and except supervisors, persons above the rank of supervisor, office & sales staff, security guards, quality control personnel persons employed less than 24 hours per week and students employed during the school vacation period." (61 employees in the unit).

Number of names of persons on revised voters' list	58
Number of persons who cast ballots	58
Number of ballots marked in favour of applicant	53
Number of ballots marked against applicant	5

1055-76-R: United Steelworkers of America (Applicant) v. "Southern Deming" Division of Crane Canada Limited (Respondent) v. Local 219, National Council of Canadian Labour (Intervener).

Unit: "all employees of "Southern Deming" Division of Crane Canada Limited in the Township of Charlottenburg, save and except foremen, assistant foremen, persons above the rank of foreman and assistant foreman, office, clerical and sales staff, quality control personnel, industrial engineering personnel, persons regularly employed for not more than twenty-four hours per week, students employed under a co-operative university or school vacation period." (22 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	15
Number of ballots marked in favour of applicant	13
Number of ballots marked in favour of intervener	2

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

0871-76-R: Employees' Association of Ethyl Corporation of Canada Ltd. (Applicant) v. Ethyl Corporation of Canada Ltd. (Respondent) v. Oil, Chemical and Atomic Workers International Union (Intervener). (99 employees).

0916-76-R: United Brotherhood of Carpenters and Joiners of America, Local 1669 (Applicant) v. Scorpio Engineering and Scorpio Engineering Limited (Respondent) v. T.E.L. Council of Trade Unions (Intervener). (8 employees).

0972-76-R: United Steelworkers of America (Applicant) v. Canadian Wire Brush Company Division of Sweepco Industries Inc. (Respondent). (34 employees).

1002-76-R: Ontario Haulers Association Inc. (Applicant) v. Repac Construction & Materials Limited (Respondent) v. A Council of Trade Unions acting as the representative and agent of Teamsters Local Union 230 and Labourers' International Union of North America, Local Union 183 (Intervener).

1003-76-R: Ontario Haulers Association Inc. (Applicant) v. Sherman Sand & Gravel Limited (Respondent). (59 employees).

1018-76-R: Brewery, Soft Drink, Distillery, Distributors and Miscellaneous Workers, Local 1000 Affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Green Giant of Canada Limited (Respondent). (344 employees).

1139-76-R: United Steelworkers of America (Applicant) v. Canadian Admiral Corporation, Ltd. (Respondent) v. Group of Employees (Objectors). (7 employees).

Certification Dismissed Subsequent to Post-Hearing Vote

0357-76-R: Local Union 636, International Brotherhood of Electrical Workers (Applicant) v. The Regional Municipality of Halton (Respondent) v. Group of Employees (Objectors).

Unit: "all office, clerical and technical employees of the Regional Municipality of Halton, save and except supervisors, those above the rank of supervisor, all persons employed in the office of the regional chairman, the office of the chief administrative officer, the legal department and the personnel department, the confidential secretaries to department heads, professional engineers, all persons employed for less than 24 hours per week, all students employed during the school vacation period and/or on a co-operative study program at University or community college, persons covered by subsisting collective agreements, persons employed in homes for the aged and persons employed in health services." (214 employees in the unit).

Number of names of revised voters' list		109
Number of persons who cast ballots		103
Ballots segregated and not counted	2	
Number of ballots marked in favour of applicant	50	
Number of ballots marked against applicant	51	

0752-76-R: United Plant Guard Workers Local 1962 (Applicant) v. Allied Investigation and Security Limited (Respondent).

Unit: "all employees of the respondent employed as security guards in the Municipality of Metropolitan Toronto, save and except staff sergeant, persons above the rank of staff sergeant, office, clerical and sales staff, persons regularly employed for not more than 24 hours, and students during the school vacation periods." (130 employees in the unit).

Number of names of persons on revised voters' list		92
Number of persons who cast ballots		68
Number of ballots marked in favour of applicant	29	
Number of ballots marked against applicant	39	

0893-76-R: International Union of Operating Engineers, Local 793 (Applicant) v. Miller Paving Limited (Respondent).

Unit: "all employees of Miller Paving Limited working in the County of Lennox and Addington, and the County of Frontenac and the Townships of Rear of Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, engaged in the operation of cranes, shovels, bulldozers, and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and those above the rank of non-working foreman." (12 employees in the unit).

Number of names of persons on revised voters' list		14
Number of persons who cast ballots		14
Number of ballots marked in favour of applicant	3	
Number of ballots marked against applicant	11	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

1047-76-R: Labourers' International Union of North America Local 247 (Applicant) v. George Wimpey Canada Limited (Respondent). (23 employees).

1063-76-R: Ottawa Typographical Union, Local 102 (Applicant) v. Public Service Alliance of Canada (Respondent). (4 employees).

1080-76-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1963, 1747, 2480, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. The Frid Construction Company (Respondent). (14 employees).

1083-76-R: Ontario Haulers Association Inc. (Applicant) v. Dufferin Aggregate Division of Dufferin Construction and Materials Ltd. (Respondent). (50 employees).

1092-76-R: Labourers' International Union of North America, Local 183 (Applicant) v. Bro Industrial Development Corporation Limited (Respondent). (22 employees).

1116-76-R: Lake Ontario District Council, on behalf of Locals 397, 572, 1071, 1450 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Rusgate Construction Co. Ltd. (Respondent). (2 employees).

1131-76-R: Canadian Union of Public Employees (Applicant) v. City of Brampton Public Library Board (Respondent). (76 employees).

1180-76-R: Labourers' International Union of North America, Local 837 (Applicant) v. Lucato Bros & Co. Ltd. Masonry Contractors (Respondent). (6 employees).

1183-76-R: Teamsters Union Local 879, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Cushman Rentals Limited (Respondent). (no employees).

1192-76-R: Lake Ontario District Council, on behalf of Locals 397, 572, 1071, 1450 of The United Brotherhood of Carpenters and Joiners of America (Applicant) v. Bradsil Ltd. (Respondent). (4 employees).

1205-76-R: United Brotherhood of Carpenters and Joiners of America, Local 38 (Applicant) v. Arthur G. McKee and Company of Canada Ltd. (Respondent). (31 employees).

1222-76-R: Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Central Canadian Structures Co. Ltd. (Respondent). (3 employees).

1229-76-R: Canadian Union of Public Employees (Applicant) v. Canadian Council on Social Development (Respondent). (51 employees).

1239-76-R: International Union of Operating Engineers, Local 793 (Applicant) v. Irois Landscape Ltd. (Respondent). (2 employees).

1240-76-R: United Brotherhood of Carpenters & Joiners of America (Applicant) v. Fleck Manufacturing Company (Respondent). (120 employees).

1302-76-R: International Association of Bridge, Structural & Ornamental Ironworkers, Local 736 (Applicant) v. I B G of Canada Limited (Respondent). (2 employees).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0603-76-R: John B. Keais (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 527 (Respondent) v. North Eastern Mechanical Contracting Limited (intervener). (*Terminated*).

Unit: "all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of North Eastern Mechanical Contracting Limited in the County of Wellington, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

Number of names of persons on list as originally prepared by employer		4
Number of persons who cast ballots		4
Number of ballots marked in favour of Respondent	0	
Number of ballots marked against Respondent	4	

0988-76-R: John M. Jeffrey (Applicant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Respondent). (13 employees). (*Terminated*).

1113-76-R: Mark Assaf (Applicant) v. London and District Service Workers Union, Local 220 (Respondent) v. Mount Pleasant Cemetery (London) Inc. (Intervener). (8 employees). (*Terminated*).

APPLICATION FOR DECLARATION OF SUCCESSOR STATUS

0564-76-R: Canadian Union of Public Employees, Local One (Applicant) v. The Ontario Municipal Employees Retirement Board (Respondent) v. The Canadian Union of Public Employees Local 1923 (Predecessor Trade Union). (*Granted*).

APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

1029-76-U: Lake Ontario Steel Company Limited (Applicant) v. Peter McLean and Douglas Tobin (Respondent). (*Withdrawn*).

1102-76-U: The Citizen, A Division of Southam Press Limited (Applicant) v. Ottawa Web Pressmen's Union, #62, and Mr. David Lundy (Respondents). (*Granted*).

1130-76-U: Bendix Heavy Vehicle Systems Ltd. (Applicant) v. All Those Persons Named On Schedule A (Respondents). (*Withdrawn*).

1143-76-U: Bechtel Canada Ltd. (Applicant) v. A. Desousa, A. Attene, G. Autry, B. Breaton, S. Brown, J. Beirao, F. Campbell, V. Dalessandro, F. Dasilva, A. Ermatinger, S. Fanelli, A. Ferreira, O. Ferrera, A. Filia, E. Giannacopoulos, J. Girden, R. Goulart, P. Hecimovich, R. Kimber, O. Larocque, F. Leonardes, I. Lieggaio, J. Murphy, M. Njezic, L. Paglia, B. Petrauskas, T. Pitre, B. Prashad, D. Russell, M. Savo, R. Suvajac, J. Trepanier, U. Troiani, J. Vandenberghe, P. Vandenberghe, B. Vanhoorn, A. Ventre, C. Wright, D. Zavitz (Respondents). (*Direction*).

1153-76-U: Domglas Ltd. (Applicant) v. United Glass and Ceramic Workers of North America, Mr. O.H. Ferguson, Mr. James Perna, and the Respondents Listed on Schedules "A" to "E" (Respondents). (*Granted*).

1179-76-U: The Corporation of the Regional Municipality of Sudbury, The Sudbury Board of Education, and Acme Building and Construction Limited and David K. Lansdowne and Partners Limited, carrying on business as a Joint Venture Partnership as Acme-Lansdowne Joint Ventures (Applicants) v. Local Union 1687 International Brotherhood of Electrical Workers, Lou Popovitch, Gerry Roberge, Dennis Therrien, J.D. Benoit, M. Lapraire (Respondents). (*Direction*).

1191-76-U: Toronto Iron Works Company (Applicant) v. The United Steelworkers of America; Local 2820 of the United Steelworkers of America; Len Dacey; David Martin (Respondents). (*Withdrawn*).

1213-76-U: Canadian Timken Limited (Applicant) v. The United Steelworkers of America, A.F. of L. - C.I.O. - C.L.C. and Local Unlon 4906 (Respondent). (*Withdrawn*).

1225-76-U: Mansfield-Denman General Company Limited, Industrial Products Division, Welland, Ontario (Applicant) v. W. Garrett, M. Steers, S. Omos, L. Munro, C. Page, R. Pekrul, T. Giovinazzo, R. Hardy, T. Paolone, L. Colon, F. Nero, I. Drobylen, T. Leadley, A. Ferrusi, P. Nero, J. Panagabko, M. Berg, C. Koeman, S. Gaudette, M. Kellar, D. Mattie, M. Penn (Respondents). (*Withdrawn*).

1226-76-U: Nansfield-Denman General Company Limited Industrial Products Division, Welland, Ontario (Applicant) v. W. Garrett, M. Steers, S. Omos, L. Munro, C. Page, R. Pekrul, T. Giovinazzo, R. Hardy, T. Paolone, L. Colon, F. Nero, I. Drobylen, T. Leadley, A. Ferrusi, P. Nero, J. Panagabko, M. Berg, C. Koeman, S. Gaudette, M. Kellar, D. Mattie, M. Penn (Respondents). (*Withdrawn*).

1234-76-U: Consolidated Bathurst Packaging Limited (Applicant) v. International Woodworkers of America, and its Local 2-69 (Respondent). (*Withdrawn*).

1298-76-U: Liquid Carbonic Canada Ltd. (Applicant) v. L. Anderson, et al, (see Schedule "A" attached) (Respondents). (*Direction*).

APPLICATIONS FOR DECLARATION THAT LOCK-OUT UNLAWFUL

0999-76-U: Mr. Ronald K. MacIver (Applicant) v. The Peel Board of Education (Respondent). (*Dismissed*).

1204-76-U: Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Canadian Abattoir, also known as Better Beef Limited (Respondent). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO PROSECUTE

0377-76-U: Labourers' International Union of North America, Local 1036 (Applicant) v. George Ryder Construction Limited, George Ryder, George Riffer and Pentti Koskela (Respondents). (*Withdrawn*).

0510-76-U: Labourers' International Union of North America, Local 493 (Applicant) v. Winson Construction Limited, Hans Wintjes and Henry Lavign (Respondents). (*Granted*).

1075-76-U: Nadrofsky Steel Erecting Limited (Applicant) v. Gary Robinson (Respondent). (*Withdrawn*).

1227-76-U: Mansfield-Denman General Company Limited Industrial Products Division, Welland, Ontario (Applicant) v. W. Garrett, M. Steers, S. Omos, L. Munro, C. Page, R. Pekrul, T. Giovinazzo, R. Hardy, T. Paolone, L. Colon, F. Nero, I. Drobylen, T. Leadley, A. Ferrusi, P. Nero, J. Panagabko, M. Berg, C. Koeman, S. Gaudette, M. Kellar, D. Mattie, M. Penn (Respondents). (*Withdrawn*).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

1693-75-U: Albert Ceccotti, Antonio Di Giammatteo, Corrado Di Sabatino, Louis Fidenza, Mike Henderson, Ron Manderson, S. Ippolito, S. Jessa, Joseph K. Joseph, J. Lopen, George Nikolica, Peter Nikolica, P. Perreault, S. Resende, C. Micottone, A. Somani, Jim Votour, W. Neaver, Carmelo Castellano, H. Hunter, C. Marchese, S. Publisi, V. Topolinsky and Doug Webb (Complainants) v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America Local 879, Leonard Schultz, Louigi Pasinato & Adbo Contracting Company Ltd. (Respondents). (*Withdrawn*).

1891-75-U: Teamsters Union Local 141 affiliated with the International Brotherhood of Teamsters, Chauffeurs, and Helpers of America (Complainant) v. N. J. Spivak Limited (Respondent). (*Granted*).

1910-75-U: Louis R. Gagnon (Complainant) v. International Union of Operating Engineers, Local 793 (Respondent). (*Terminated*).

0164-76-U: Teamsters Union Local 141 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. N. J. Spivak Limited (Respondent). (*Dismissed*).

0253-76-U: Canadian Textile and Chemical Union (Complainant) v. McGregor Hosiery Mills (Respondent).

- and -

0282-76-U: Canadian Textile and Chemical Union (Complainant) v. McGregor Hosiery Mills (Respondent).

- and -

0311-76-U: Canadian Textile & Chemical Union (Complainant) v. McGregor Hosiery Mills (Respondent). (*Granted*).

0498-76-U: Ontario Nurses' Association (Complainant) v. Algoma Health Unit (Respondent). (*Withdrawn*).

0552-76-U: John Charlton Gable (Complainant) v. Kingston Vending Limited (Respondent). (*Dismissed*).

0628-76-U: A. Silic (Complainant) v. Canadian Union of Public Employees, Local 910, its servants and agents (Respondent). (*dismissed*).

0633-76-U: Warehousemen and Miscellaneous Drivers Local Union No. 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. I.C.B. Warehousing Division of Alar-Anson (Respondent). (*Granted*).

0645-76-U: Keith Sutherland (Complainant) v. The Ontario Municipal Employees Retirement Board (Respondent) v. Canadian Union of Public Employees, Local 1923 (Intervener). (*Dismissed*).

0812-76-U: Retail Clerks International Association, Local 409 (Applicant) v. Zalgar Investments Incorporated (Respondent). (*Dismissed*).

0869-76-U: Antonio Melillo (Complainant) v. Sheet Metal Workers' International Association Local 540 (Respondent) v. Barber Coleman of Canada Ltd. (Respondent). (*Dismissed*).

0931-76-U: Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. A. & T. Haulage Limited (Respondent). (*Withdrawn*).

1087-76-U: Leo Kent (Complainant) v. U.A.W. Local 127 Union International Harvester Works Dept. Chatham (Respondent). (*Withdrawn*).

1089-76-U: Retail Wholesale and Department Store Union, AFL:CIO:CLC (Complainant) v. James Bamford & Sons Limited (Respondent). (*Withdrawn*).

1090-76-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Complainant) v. James Bamford & Sons Limited (Respondent). (*Withdrawn*).

1106-76-U: Amalgamated Meat Cutters and Butcher Workmen of North America AFL-CIO-CLC (Complainant) v. Canadian Abattoir, also known as Better Beef Limited (Respondent). (*Withdrawn*).

1107-76-U: Retail Clerks Union, Local 206, chartered by the Retail Clerks International Association (Complainant) v. Zehr's Markets Limited (Respondent). (*Withdrawn*).

1123-76-U: Labourers' International Union of North America, Local 183 (Complainant) v. Bro Industrial Development Corporation Limited (Respondent). (*Withdrawn*).

1142-76-U: Canadian Union of Public Employees (Complainant) v. Leamington District Memorial Hospital (Respondent). (*Withdrawn*).

1149-76-U: United Plant Guard Workers, Local 1962 (Complainant) v. Allied Investigation and Security Limited (Respondent). (*Withdrawn*).

1160-76-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.) (Complainant). v. Canadian Cold Forging and Coining Company Limited (Respondent). (*Withdrawn*).

1177-76-U: United Plant Guard Workers, Local 1962 (Complainant) v. Allied Investigation and Security Limited (Respondent). (*Withdrawn*).

1188-76-U: John P. Tryfiak and Richard Berry (Complainants) v. International Union of Operating Engineers, Local 793 (Respondent) v. Arthur G. McKee and Company of Canada Limited (Intervener). (*Dismissed*).

1203-76-U: Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Complainant) v. Canadian Abattoir, also known as Better Beef Limited (Respondent). (*Withdrawn*).

1211-76-U: Service Employees Union, Local 210 affiliated with Service Employees International Union A.F.L.-C.I.O.-C.L.C. (Complainant) v. Country Village Incorporated (Respondent). (*Withdrawn*).

APPLICATION FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0955-76-M: Canadian Union of Public Employees, Local 740 (Trade Union) v. Corporation of the Town of Deep River (Employer). (*Withdrawn*).

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0977-76-JD: Cooperheat of Canada Ltd. (Complainant) v. International Brotherhood of Electrical Workers, and IBEW Locals 804 and 530 (Respondent). (*Withdrawn*).

1301-76-JD: Labourers' International Union of North America, Local 1036 (Complainant) v. International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 786 and Andco Anderson Limited (Respondents). (*Granted*).

APPLICATION FOR DETERMINATION UNDER SECTION 95(2)

1128-76-M: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Applicant) v. Blackstone Industrial Products Limited (Respondent). (*Withdrawn*).

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1157-76-M: George Wimpey Canada Ltd. (Employer) v. International Union of Operating Engineers, Local 793 (Trade Union). (*Terminated*).

1197-76-M: Capital Paving Limited (Employer) v. International Union of Operating Engineers, Local 793 (Trade Union). (*Terminated*).

APPLICATIONS UNDER SECTION 112A

1077-76-M: International Union of Operating Engineers, Local 793 (Applicant) v. Brain D. Soules Equipment Rentals (Respondent). (*Withdrawn*).

1094-76-M: Nadrofsky Steel Erecting Limited and Crane Rental Association of Ontario (Applicants) v. International Union of Operating Engineers Local 793 (Respondent). (*Withdrawn*).

1111-76-M: Labourers' International Union of North America, Local 183 (Applicant) v. Sutherland Underground Electric Ltd. (Respondent). (*Withdrawn*).

1112-76-M: Labourers' International Union of North America, Local 506 (Applicant) v. Waynco Ltd. (Respondent). (*Withdrawn*).

1134-76-M: Labourers' International Union of N. A., Local 1089 (Applicant) v. Reliable Mechanical Contractors, Inc. and/or Their Bargaining Agent The Sarnia Construction Association (Respondents). (*Withdrawn*).

1148-76-M: United Brotherhood of Carpenters and Joiners of America Local 1256 (Applicant) v. C. H. Heist Ltd. (Respondent). (*Withdrawn*).

1212-76-M: International Union of Operating Engineers Local 793 (Applicant) v. Climbing Crane Service Ltd. (Respondent). (*Withdrawn*).

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1889-75-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (U.A.W.) (Applicant) v. Standard Tube Canada Limited (Respondent) v. Standard Tube Employees' Trade Union (Predecessor Trade Union) v. Group of Employees (Objectors). (*Request Denied*).

0662-76-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Dad's Cookies Ltd. (Respondent) v. Group of Employees (Objectors). (*Request Denied*).

0710-76-U: Arthur G. McKee and Company Canada Limited (Applicant) v. R. Armstrong, et al (See Schedule "A" attached hereto) (Respondents). (*Prosecution*). (*Request Denied*).

1362-76-U: Service Employees Union – Local 210 (Affiliated with Service Employees International Union) AFL-CIO-CLC (Complainant) v. The Board of Trustees of the Roman Catholic Separate Schools for the City of Windsor (Respondent). (*Section 79*). (*Request Denied*).



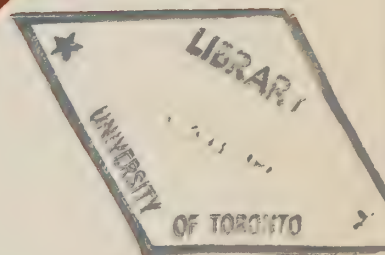
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– Whether union may complain of unfair practices directed at managerial employees – S79(1) – Whether conduct interference with trade union – S56 – Whether the Board will order re-instatement of a managerial employee –

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Discharge For Union Activity – Evidence – Consent to Prosecute – Whether persons exercising managerial functions may benefit, directly or indirectly from remedial provisions of the Act –

– S79(4a) – Effect of reverse burden on assessing competing inferences in the evidence –

Effect of discharges occurring immediately after organizational drive –

– Whether union may complain of unfair practices directed at managerial employees –

S79(1) – Whether conduct interference with trade union – S56 – Whether the Board will order re-ins-tatement of a managerial employee –

– Whether Board will grant consent to prosecute where a remedy has been granted by the Board regarding the violations.

BEFORE: Donald D. Carter, Chairman, and Board Members J.D. Bell and E. Boyer.

APPEARANCES: *Martin Levinson and Cam Nelson for the applicant; Norman Rhora for the respondents.*

DECISION OF CHAIRMAN DONALD D. CARTER, AND BOARD MEMBER E. BOYER: December 22, 1976.

2. These matters consist of two applications brought under section 79 of the *Labour Relations Act* seeking remedial relief from the Board, and one application brought under section 90 of the Act seeking consent to prosecute. One of the applications brought under section 79 relates to three dismissals occurring shortly after the initiation of a union organizing drive, while the other relates to a dismissal that occurred subsequently. The application for consent to prosecute overlaps both section 79 applications, covering the three dismissals and the subsequent dismissal. The applications, therefore, were joined in order that evidence common to all three applications be heard together.

3. The two respondents to the applications are both in the business of operating a telephone answering service. A.A.S. Telecommunications Ltd. is a company owned and operated by Norman Rhora, while Zipcall Ltd. is jointly owned by Rhora and a Mr. Gallo. Although Gallo was purportedly the manager of Zipcall Ltd., the evidence before the Board indicated that Rhora played an active role in the management of its affairs and, indeed, in respect of the events complained of, assumed the primary role.

4. The respondents together employed about twenty persons, three of which were dismissed on the evening of July 14th, 1976. Two of these persons, Belle Bird and Melody Potts, were subsequently reinstated just prior to the first hearing in these matters. Bird was reinstated at a lower-rated job, which she continues to hold, while Potts' reinstatement was short-lived, lasting only until she was dismissed again on September 1st, 1976, the day of the first hearing into these matters.

5. There is no question that two of these persons, Heather Stockfish and Melody Potts, are employees within the meaning of the *Labour Relations Act*. The third person, Belle Bird, was employed as a supervisor at the Zipcall location on Withrow Avenue. The com-

plainant, although conceding that there was some question as to whether Bird could be considered as an "employee", requested the Board to consider initially whether remedial relief might be available regardless of her status. Given the possibility that this manner of proceeding might avoid a lengthy inquiry into Bird's status, the Board decided to deal first with the general question raised by the complainant. Put simply, that general question is whether persons exercising managerial functions may benefit, either directly or indirectly, from the remedial provisions of the *Labour Relations Act*.

6. The general question of the scope of the remedial provisions of the Act, however, cannot be dealt with in isolation from the particular facts of this case. The Board, before examining the scope of its remedial power, must determine whether specific contraventions of the Act have occurred. There is no question that the three initial dismissals, all of which took place on the evening of July 14th, occurred in the context of the complainant's organizing drive. That organizing drive was encouraged, at least in part, by Bird, who in April of this year contacted an official of one of the complainant's locals about organizing the employees of Zipcall Ltd., and supplied the names of employees that might be interested in the union. Nothing further was heard by Bird until July 13th when she received a call from Potts. On that same day, Potts had been contacted at home by Jerry Thompson, a national representative of the complainant, asking for names of employees. Apparently, Thompson's suggestion that Bird might be able to supply additional names prompted Potts' call to Bird. Bird responded by giving Stockfish's name to Potts.

7. On July 14th, Potts phoned the location at which Stockfish worked, and left a message for Stockfish to call her. The call was returned by a person who identified herself as Stockfish. Potts indicated that Bird had supplied Stockfish's name to her, and that the call was about the union. The persons at the other end of the line asked whether she could contact Potts at home, and was given Potts' home phone number. As it turned out, Potts had not been speaking to Stockfish, but to Barbara Dorland. Dorland had taken the first call from Potts, and had given Stockfish the message to call Potts about a party. Stockfish, however, did not recognize Potts' name, and asked Dorland to return the call. After the call was completed, Dorland relayed the message about the union and then added, "If Mr. Rhora finds out, he will fire you." Later that same afternoon, Stockfish called Bird and asked her about the union. Bird told her to phone later to her home. Stockfish did call Bird that evening, at which time Bird advised in favour of the union.

8. Thompson testified that it was not until June 13th that he was contacted by the local union official whom Bird had initially called. At that time, the local union official had turned over the names supplied by Bird, and it was then decided to attempt to get more names. Potts was contacted because it was known that her father was an official in another union. Potts was told that Bird had supplied some names, and was asked for additional names. Thompson also testified that the dismissals of Bird, Potts and Stockfish on the evening of July 14th had killed the organizing campaign, as he was unable to sign up any employees subsequently.

9. The respondents gave a number of reasons for the dismissals. The primary reason given for Bird's dismissal was her lack of judgment in assessing employees. Specifically, it was claimed that Bird was responsible for hiring Potts, and then not training her sufficiently for the job to which she was subsequently assigned by Rhora, and also for giving Stockfish a favourable recommendation when Rhora was considering whether to hire her. A second

justification for Bird's dismissal was that, because of her age, she was no longer able to perform satisfactorily her duties as supervisor, and was being overpaid for the work she was doing. In this regard there appeared to be two specific complaints – Bird's spelling ability, and her failure to notify Rhora that a switchboard was ready for use, an omission that meant that the board, although paid for, was not in use for about a month. The respondents stated that Bird was initially dismissed, rather than demoted, because dismissal of a long-service employee was considered to be less disruptive. The primary justification given by Rhora for Stockfish's dismissal was that she had made personal telephone calls during business hours. Under cross-examination, Rhora stated that his knowledge of Stockfish's use of business phones for personal conversation was derived from Dorland. Stockfish's lateness, and her failure to notify promptly of two absences from work, were also supplied as reasons for her dismissal. The Potts' dismissal was primarily justified on the basis that she was unable to perform the work required at Active Answering Service's location at 67 Yonge Street. Potts had first been assigned to the Withrow Avenue location for training under Bird for a few days, and then was assigned as the sole operator at the 67 Yonge Street location. A specific complaint was that she was not writing orders for new service, and that the one order that she had taken was made out improperly. A further complaint was that Potts was unable to cope with the transfer of lines at the Yonge Street location and, as a result, customers had been lost.

10. The three dismissals, however, were not the end of the matter. In the week prior to the date of the first hearing in this matter, the respondents rehired Potts and Bird, apparently in an attempt to settle the matter. Bird resumed work at the Withrow Avenue location, but in a non-supervisory job, and her employment in that job has continued. Potts resumed working on August 26th, but was dismissed on September 1st, the date of the first hearing in this matter. The reason given for the second dismissal of Potts was that, on two occasions, she had failed to answer promptly a particular line, creating the possibility of losing a major customer. The accounts of this incident differed markedly. Potts testified that she did not let the line ring repeatedly, and that the customer was dissatisfied because Potts had not been able to take a name and number from a caller, the caller having declined to leave this information. Rhora, for the respondents, indicated that his supervisor had told him that Potts had admitted letting the line ring fourteen times on the first occasion, and nine times on the second occasion. Relying on the account given by the supervisor, Rhora had then decided to dismiss Potts for a second time.

11. The right of an employee to organize and to join a trade union has been recognized as being fundamental to the practice of collective bargaining. It is a right that has not only been expressly set out in section 3 of the *Labour Relations Act*, but has also been protected by specific statutory prohibitions designed to protect both the union and the employee from employer intrusions upon organizational activity. The core of the employee protections, found in section 58 of the Act, protects the employee from dismissal and other forms of employer retaliation. These protections are activated by a finding of improper employer purpose – The existence of any element of anti-union motive constituting a breach of the statutory prohibition. Employee participation in the organization of a trade union need be only one of the reasons, and not the sole reason or primary reason, for employer conduct in order for that conduct to fall within the statutory prohibition. This approach, providing broad protection to employees, is clearly dictated by the legislative recognition of the fundamental nature of the right to organize.

12. The determination of the motivations underlying employer conduct, however, even absent any requirement to identify an overriding motive, is not an easy task. The employer is the person best able to testify as to underlying motive, but the employer, who can hardly be regarded as a disinterested party in the proceedings, is often reluctant to disclose the evidence to which it has access. The legislative answer to this conundrum has been to reverse the burden of proof where there is a complaint that an employee has been dealt with contrary to the Act.

13. The legal effect of the reverse burden, established by section 79(4a) of the Act, has now been considered in a number of decisions of this Board. First of all, it is clear that the reverse burden may be resorted to at the end of a case when the Board finds the evidence so evenly balanced that no clear inference can be drawn. In such a case, the burden, not having been discharged by the employer, the Board must find that the employer's conduct falls within the statutory prohibition. See *Barrie Examiner*, [1975] OLRB Rep. Oct. 745. A secondary implication of the reverse burden is that it also operates to induce an employer to come forward with an explanation of the conduct that is the subject of a complaint. The Board has determined that a complainant need not establish a *prima facie* case of an employer contravention in order for the reverse burden to apply, the filing of a complaint in respect of an employee being a sufficient condition for its application. (See *I.C.B. Warehousing*, [1976] OLRB Rep. Oct. 621.) The lack of any requirement for a complainant to establish a *prima facie* case of an employer contravention means that an employer either must come forward with some evidence in the way of an explanation or run the real risk of the Board facing an evidential situation from which it is unable to draw any clear inference. Recognizing that, as a practical matter, the employer must provide some evidence in the way of an explanation, the Board when dealing with a complaint to which section 79(4a) applies has adopted as its standard practice the procedure of having the respondent proceed first.

14. The existence of the reverse burden of proof, however, does not mean that the determination of employer motive has now become an easy task for the Board. The Board is still faced with the problem of assessing the evidence presented to it and drawing inferences from that evidence. There are many cases in which employers come forward with plausible explanations of their conduct from which it can be inferred that an employer's conduct is not in contravention of the Act. As a tactical matter, in these cases the complainant must introduce evidence to rebut that inference since, in the absence of any evidence from the complainant, the Board would conclude that the employer has met the burden imposed on it by section 79(4a). The result is that, in most cases, the Board has presented to it evidence from both the employer and the complainant. This evidence must then be assessed and inferences must be drawn. Such factors as the existence of a pattern of anti-union activity on the part of the employer, the employer's knowledge of the existence of union activity and of the employee's involvement in that activity, the manner in which the employee was discharged, and the credibility of the witnesses must all be considered. The Board's responsibility to assess the evidence, therefore, is one that cannot be avoided by seeking refuge in the reverse burden.

15. The instant case is one where the evidence leaves the Board with competing inferences. The respondents have asked us to draw the inference that the three persons, although they may have been let go rather suddenly were dismissed solely because of their unsatisfactory work performance. The complainant, on the other hand, has asked us to draw the infer-

ence that the dismissals were motivated, at least in part, by the involvement of the three in the organizing drive. We will deal first of all with the complaints in respect of Potts and Stockfish, since there is no question that they are employees within the meaning of the *Labour Relations Act*.

16. The evidence relating to the dismissal of Stockfish and to the initial dismissal of Potts favours the inference that these two dismissals were motivated by an anti-union animus on the part of the respondents. The respondents introduced evidence, much of it hearsay, relating to the unsatisfactory performance of these three employees. The lack of direct evidence of unsatisfactory performance, by itself, need not point to anti-union motive, since one could still draw the inference that the respondents, relying on the accounts of others, had at least perceived these employees to be unsatisfactory. The existence of a substantial amount of evidence from the complainant, however, does make us doubt whether unsatisfactory work performance was the only reason for the two dismissals.

17. The fact that the dismissals occurred immediately after the organizing drive had commenced casts a shadow over the respondents' explanation. The shadow becomes heavier in the case of Potts, since there does not appear to have been any particular aspect of her work performance that might have precipitated the dismissal at that time. In the case of Stockfish, the precipitating incident might be regarded as the use of the business phone for personal matters on July 14th. Personal use of the phone by Stockfish on that day appeared to be limited, however, being confined to asking Dorland to call Potts, and then making a brief call to Bird. Given this very limited amount of personal use, it is difficult to resist drawing the inference that the respondents were not so much concerned about possible disruption to the operation of the business as they were about the fact that Stockfish had become involved in the complainant's organizing activity.

18. Another fact that cannot be ignored is that Potts, Stockfish, and Bird, the three persons that had become involved in the complainant's organizing drive, were dismissed almost simultaneously. The explanation for this rather unusual coincidence was that Bird was the common link, having hired and trained Potts and having recommended Stockfish. We find this explanation to be less than convincing, since it is difficult to see what event, other than the union's organizing drive, would have precipitated the dismissal of Bird at that particular time. Bird's failure to notify Rhora of the activation of the switchboard had been discovered two weeks earlier, and it did not draw even a reprimand. The precipitating event, then, would appear to be her connection with the organizing drive, rather than any particular aspect of her work performance. The timing of the three dismissals, then, leaves the inference that Potts' dismissal and Stockfish's dismissal were just part of a pattern of anti-union activity that manifested itself on the evening of July 14th.

19. A final factor is that the means of knowing of the organizing drive and of the participation of Potts, Stockfish, and Bird in that activity were available to the respondents. Rhora testified that it was Dorland who told him of Stockfish's personal use of business phones. It is quite conceivable that Dorland might also have informed Rhora of the conversations about the union, and identified Potts, Stockfish, and Bird as being involved.

20. These considerations, along with our assessment of the credibility of the witnesses, lead us to conclude that Potts and Stockfish were dismissed on July 14th because of their involvement in the complainant's organizing drive. This conclusion in no way depends on

the existence of the reverse burden. On the evidence before us, we are able to draw a clear inference that the two dismissals were motivated, at least in part, by an anti-union animus.

21. Potts' subsequent dismissal on September 1st is more problematic, being removed in time from the dismissals of July 14th. Can it be said that this dismissal was the final act in a pattern of anti-union conduct, or was it a discrete incident? There is some evidence, albeit of a hearsay nature, that there was a particular problem relating to work performance that may have precipitated the dismissal. On the other hand, it was clear that Potts was still associated with the complainant, and that the complainant by bringing proceedings before the Board still represented a threat to the respondents. Given the earlier anti-union conduct of the respondents, we are not convinced that this dismissal was not a continuation of the pattern of anti-union conduct that emerged earlier. Our conclusion, therefore, is that the respondents have not established on the balance of probabilities that the dismissal was not motivated by an anti-union animus.

22. Our findings that the dismissal of Stockfish and the two dismissals of Potts are in violation of section 58(a) of the Act require us to fashion an appropriate remedy. In her testimony, Stockfish indicated that she had found another job on August 16th, and that she did not wish to return to employment with the respondents. We, therefore, direct the respondents to pay to Heather Stockfish full compensation for any lost wages to which she is entitled up to August 16, 1976. Potts, on the other hand, indicated a desire to return to the job from which she had been dismissed. Accordingly, the Board directs that the respondents forthwith reinstate Melody Potts in the position that she held on July 14, 1976, prior to being dismissed, and that the respondents pay to Melody Potts full compensation for any lost wages to which she is entitled to the date of reinstatement. The Board remains seized of this matter to deal with any disagreement between the parties arising out of the implementation of these directions.

23. There remains the difficult question of the respondents' dismissal of Bird, assuming that she is a managerial employee. The prohibitions set out in section 58 of the Act, protecting the right of individual employees to organize, do not extend as far as the managerial employee. The Board has recognized that the effect of *Associated Medical Services Ltd.* (1964) 44 D.L.R. (2d) 407 was to restrict the meaning of the word "person" in section 58 to "employees" as defined by the Act. (See *Ottawa General Hospital* (No.1), [1974] OLRB Rep. Mar. 193.) Managerial employees, since they are expressly excluded as employees, are not covered by the core of employee protections set out in section 58. In other words, these protections apply only to those persons entitled under the Act to join a union and to participate in its lawful activities.

24. Managerial employees, however, are not left completely unprotected by the *Labour Relations Act*. A limited protection has been extended to this group of persons by section 80. The Board has held that section 80 not only extends to the managerial employee remedial protection where there has been a violation of section 71, but remedial protection where there has been a violation of any other provision of the Act. (See *Ottawa General Hospital* (No.1), *supra*.) This protection, however, is much more narrow than might appear from the fact of this proposition. The important limitation is that there must be a violation of a substantive provision of the Act before any remedial relief is available to the managerial employee, raising the question of the extent to which the managerial employee falls within the substantive protections of the Act.

25. Dealing with the issue of whether a managerial employee has any statutory right to become a member of a trade union and to participate in its lawful activities, the Board, in *Ottawa General Hospital* (No.2), [1974] OLRB Rep. Oct. 715, stated, at p. 723:

24. In our view, it would be repugnant to the whole scheme of the Act to conclude (as we would have to do if we were to accept the argument of counsel for the complainant) that a managerial person is given any such right by the Act. The broad language of section 3 – “Every person is free to join a trade union and to participate in its lawful activities” – must be read subject to the definition of “trade union” (section 1(1)(n)) as an organization of “employees” and to section 1(3)(b) which says, in effect, that a managerial person is not an “employee” for the purposes of the Act. This is not to say that no one other than an employee, in this restricted sense, can join a trade union. One of the reasons, presumably, why “person” (rather than “employee”) is used in section 3 is to enable a person not currently employed to become a member of a trade union. However, as we have said, it would be contrary to what we conceive to be the essential purpose and scheme of the Act to conclude that a managerial person has a protectable right to union membership.

The Board then went on to deal with the specific question of whether section 61 of the Act was sufficiently wide to include managerial employees. At p. 726, the Board stated:

31. The fundamental premise of the complainant’s argument is that a managerial person is free to join a trade union and to participate in its lawful activities (section 3 of the Act) and that that right is protected by section 61. Where, precisely, does that argument lead? Did the Legislature intend to confer upon a managerial person a protectable right to join an organization which has no legally enforceable right to represent him in collective bargaining? Does it follow, if the complainant’s argument is accepted, that a managerial person can hold elective office in the union, participate in bargaining on its behalf, vote in ratification and strike votes, and, where the law otherwise permits join in strike action with other members of the union? We prefer a construction of the statute which avoids these questions.

The effect of this decision, and the earlier *Ottawa General Hospital* decision, is to narrowly restrict the remedial relief available to the managerial employee. The first decision made it clear that the protections of section 58 do not apply to the managerial employee, while the second decision made it clear that the even more narrow protections of section 61 could not be extended that far. In both cases, moreover, the extent of remedial relief available to the managerial employee under section 79 was determined by defining the scope of substantive provisions of the Act, rather than by merely interpreting the remedial provision in the abstract.

26. The general remedial provision of the Act, section 79, has been amended since these two decisions. See S.O. 1975, c. 76, s. 21. Did the amendment of this remedial provision extend the legal protections afforded to the managerial employee? The Board has already recognized that the source of such protections is found in the substantive provisions

of the Act. The 1975 amendments, however, did not alter the substantive provisions of the Act so as to give the managerial employee a protectable right to join the union. The amendment of section 79, therefore, only provided the Board with a wider and more comprehensive power to remedy conduct that already constituted a contravention of the Act, and in no way conferred any new substantive rights.

27. The significance of the amendment of section 79 is that it has greatly enlarged access to the general remedial power of the Board. Prior to its amendment, section 79 only provided a remedy for conduct that was directed against the individual employee, as opposed to conduct that was directed at a union or at an employer. The remedy for these latter kinds of conduct had to be found elsewhere in the Act, being either a special remedy, such as the strike declaration and direction, or the consent to prosecute. The general remedial power, as a result of the amendment of section 79, is now available to unions and employers, as well as individual employees. The enlarged access to the Board's general remedial power has particular implications in this case.

28. The complainant argued that, even if Bird were considered a managerial employee, her dismissal could still amount to a wrong to the union – a wrong that should be remedied by the Board. This argument was based on section 56 of the Act, a section that protects a union, and not the individual employee, from certain kinds of employer interference. It was the thrust of the complainant's contention that the dismissal of Bird, just as much as the dismissal of Potts and Stockfish, interfered with its organizational drive, effectively bringing it to an end. The dismissal of Bird, therefore, constituted a contravention of section 56, and should be remedied under section 79.

29. The success of this argument depends upon two considerations. The first consideration is whether section 56 is sufficiently wide to encompass the kind of interference that is the subject of the complaint. Even if section 56 is sufficiently wide, however, there is a second consideration of whether the relief sought – reinstatement of Bird – is appropriate. Each of these questions must be dealt with in some detail.

30. The prohibition contained in section 56 is of a different legal character than the prohibition in section 58, the legality of employer conduct depending upon the consequences flowing from that conduct rather than upon the underlying motive. Interference with the "formation, selection, or administration" of a trade union is prohibited, such prohibition being qualified only where employer conduct falls within the accepted boundaries of freedom of expression. In contrast with section 58, it is not necessary under section 56 to establish an anti-union animus on the part of an employer before making a finding of illegality. Conversely, the presence of anti-union animus, in the absence of any evidence of interference, would not be sufficient to found a complaint under section 56.

31. The essential element in any complaint under section 56 is employer interference with a trade union. A distinction must be made, however, between employer conduct that actually interferes with a trade union, and employer conduct that only incidentally affects a trade union. The distinction, although only one of degree, is important because it takes into account the adversarial nature of collective bargaining. Given that the union and the employer are economic adversaries, the Board should not characterize the normal wear and tear of collective bargaining as constituting illegal interference. Conduct that threatens the formation or existence is quite a different matter, and would clearly amount to a contravention of section 56.

32. In this case, the respondents dismissed two employees and a supervisor, all of whom were involved in the complainant's organizing drive. Does this conduct amount to the kind of interference that is prohibited by section 56? The facts leave us with little doubt as to the answer. There is no question that the three dismissals had a chilling effect on the complainant's attempt to organize the other employees. Potts, Stockfish, Bird all testified that they believed the reason for their dismissal was their union activity. Thompson, moreover, testified that no employees were signed up after the dismissals occurred. In the circumstances of this case, it is reasonable to assume that the dismissals would be treated by the other employees as a clear message as to what would happen if they lent their support to the union. The conduct of the employer, therefore, clearly constituted the kind of interference that is prohibited by section 56.

33. The fact that Bird might be a managerial employee does not detract from this conclusion. Bird, even assuming that she was first-level management, was a supporter of the complainant, and recognized as such by the other employees. Although Bird's support of the union would create an obvious conflict of interest, the respondents made no attempt to justify the dismissal on this ground. As a result, the clear message to the employees was not that managerial employees would be dismissed if they put themselves in a position where there was a conflict of interest, but that anyone who supported the union would face the risk of dismissal. The dismissal of Bird, therefore, constituted a means of carrying to the employees a clear anti-union message – a message that effectively terminated the complainant's organizing drive.

34. Our finding that the conduct of the respondents, including the dismissal of Bird, constituted a violation of section 56 brings us to the question of the appropriate way to remedy the violation. The complainant argued that the wrong to the union was best redressed by reinstating Bird in the position that she held prior to her dismissal. An important question, however, is whether a remedy that indirectly benefits a managerial employee is in conflict with the recognized principle that a managerial employee has no protectable right to join a trade union.

35. It is clear to us that, if Bird is a managerial employee, she would not be entitled in her own right to relief under either section 58 or 61. The relief in this case, however, is sought by the complainant, not on behalf of an individual, but on behalf of itself. The remedy granted, therefore, must be a remedy that, in the circumstances, is appropriate for the union. This is not to say that relief that benefits an individual is not appropriate where a union is seeking relief on its own behalf, but only that it must be shown to be appropriate before it will be granted. Once it is established that such relief is appropriate for a union, however, then there would appear to be no direct conflict with the statutory exclusion of managerial employees. The remedial protection is directed to the union, and not to the individual managerial employee who benefits only incidentally. The individual managerial employee, therefore, is still given no guarantee of protection.

36. The lack of any guaranteed protection for the managerial employee does not flow only from the requirement that the remedy be appropriate to the circumstances of the case. The fact is that the right being asserted belongs to the union. The complaint must be brought by the union, and cannot be asserted by the managerial employee alone. The union, if it brings the complaint, must establish that the acts in respect of the managerial employee resulted in the kind of interference prohibited by section 56. The causal relationship

between the dismissal and the adverse consequences for the union must be clearly established. The reverse burden of proof, moreover, would not assist the union in establishing its case, since the essence of the complaint is conduct directed at a trade union rather than at a person. All of these considerations make it clear that, even if a remedy for the violation of section 56 may benefit indirectly a managerial employee, the availability of this remedy does not provide the managerial employee with anything resembling a guaranteed protection.

37. Our conclusion is that a union remedy may benefit indirectly a managerial employee and yet not be in conflict with the general principle that a managerial employee has no protectable right to join a union. Provided that a union can establish that the relief it requests is appropriate in the circumstances, then that relief must be regarded as a remedy for the union, and not as a remedy for the individual managerial employee. Turning to the circumstances of this case, we have already characterized the respondents' dismissal of Bird as amounting to the delivery of a clear anti-union message to their employees. The appropriate remedy for the union, therefore, is a remedy that will have the effect of countering that message so that the employees realize that the risk of losing one's job is not the price to be paid for participation in a union's organizing drive. In the case of the discharge of an employee who does not exercise managerial duties, the appropriate way to make this point would be for the Board to order reinstatement of the discharged employee in the position held at the time of dismissal. To adopt the same approach with the managerial employee, however, might place both the managerial employee and the employer in an intolerable situation. Given the managerial employee's divided loyalties, it is doubtful whether that person could continue to function effectively as a member of management. Complete reinstatement of Bird in this case, then, would not appear to be appropriate, yet to provide no remedy at all to the union would leave the wrong unredressed.

38. The answer to this dilemma, in our opinion, is a remedy that requires the respondents to provide employment to Bird, but that does not compel them to reinstate her in her former position as a managerial employee. The respondents, in this case, have made the implementation of this remedy easier by rehiring Bird in a job not involving the performance of managerial duties. The only further relief that need be ordered is compensation for the loss of work between the initial dismissal and the rehiring to be calculated at the rate for the job that Bird presently holds. Accordingly, the Board directs the respondents to pay to Belle Bird full compensation to be calculated in the manner set out above. This direction is made without prejudice to any relief that Bird may claim, if it is established that she is not a managerial employee. The Board remains seized of this matter to deal with any disagreement between the parties arising out of the implementation of these directions.

39. The final matter to be considered is whether the Board should give its consent to the initiation of a prosecution against the respondents. The granting of consent to prosecute by the Board has always been a discretionary matter. The nature of this discretion has been thoroughly canvassed in a recent decision of the Board, *Arthur G. McKee & Company Canada Ltd.*, [1976] OLRB Rep. Oct. 637. The authorities cited in that decision establish that the discretion is a screening device that serves two purposes. One purpose of the discretion is to prevent the bringing of vexatious prosecutions. This purpose is reflected in the requirement that an applicant make out a *prima facie* case or raise an arguable point of law. A second purpose, and a more important one, is to insulate the industrial relations process from the criminal process. Hence, the Board, in addition to requiring an applicant to make out a

prima facie case or raise an arguable point of law, must also be convinced that a prosecution would be consistent with both the promotion of good industrial relations between the parties, and the general conduct of industrial relations in the Province.

40. In this case; the applicant has clearly made out a *prima facie* case and has raised arguable points of law. These issues of fact and law, however, have been dealt with in a comprehensive fashion by this Board. The conduct that would be the subject of the prosecution, if consent is granted, is the very conduct that has been considered by this Board, and for which a remedy has been granted. The respondent has been called to account for its conduct and, as part of that exercise, the Board has attempted to fashion a remedy that will restore the *status quo* that existed prior to the occurrence of the conduct. This exercise of the Board's remedial power should make it clear to the respondents that they are not allowed to interfere with the right of their employees to organize. We do not consider that there is need to reinforce further this important principle through a criminal prosecution. In fact, a further criminal prosecution might merely increase the hostility that exists between the complainants and the respondents, making it more unlikely that the respondents might reform their attitudes toward employee organization.

41. Speaking more generally, it is clear to us that, given the expanded remedial power of the Board, applicants seeking consent to prosecute must bear a heavy onus to establish that a criminal prosecution is consistent with the promotion of good industrial relations in this Province. The remedial powers of this Board have been specifically designed to deal with industrial relations problems. Since full remedial relief from the Board is now available to unions and employers, as well as individual employees, an applicant seeking consent to prosecute should establish why the matter cannot be dealt with effectively by recourse to the Board's remedies alone. This is not to say that consent to prosecute will never be granted, since there may very well be cases where conduct is so flagrant that only the criminal sanction will be the proper deterrent. Nevertheless, before granting consent to prosecute, the Board must be satisfied that the conduct in question cannot be adequately remedied without recourse to the criminal courts.

42. For the reasons given above, the application for consent to prosecute is dismissed.

DECISION OF BOARD MEMBER J.D. BELL:

1. This is an application brought under section 79 of the *Labour Relations Act*. The applicant union alleged that the discharge of three employees – one of whom was a managerial employee – constituted a violation of sections 56, 58, 61 and 71 of the Act. On December 22, 1976 the Board issued its decision reinstating the discharged employees – including the managerial employee. At that time, I indicated that I intended to dissent with respect to the reinstatement of the managerial employee.

2. There is no substantial disagreement between us as to the facts. The majority position is based upon an assumption that one of the discharged employees – Ms. Bird – was, in fact, managerial. It was this managerial employee who originally contacted the union and supplied the names of certain employees who might be interested in forming a union. In this sense, the organization campaign originated with her. Following the original contact, the connection was maintained and the union solicited her support, requesting further names of persons who might be interested. Ms. Bird supplied at least one additional name to Ms.

Potts. Ms. Potts subsequently approached Ms. Stockfish in an effort to recruit her as a union member and advised Ms. Stockfish that Ms. Bird had supplied her name. We therefore have the involvement of a managerial person from the very outset of the organization campaign and a continued involvement and connection with the campaign both directly and indirectly.

3. It is clear that a managerial employee has no statutory right to become a member of a trade union or to participate in its lawful activities, nor is there any statutory protection for such employee should that right be abridged. To allow managerial participation in the formation of the trade union would be repugnant to the whole scheme of the Act (see *Ottawa General Hospital No. 1*, [1974] OLRB Rep. Mar. 193, and *Ottawa General Hospital No. 2*, [1974] OLRB Rep. Oct. 714). It is evident, therefore, that Bird had no statutory right to participate in union activity nor could she, on her own behalf, make any complaint if her employer had discharged her for union activity. The majority, however, appear to have circumvented the statutory limitation on our right to order reinstatement in these circumstances - a limitation which was expressly approved by the Supreme Court of Canada in the *Barbara Jarvis Case* (1964) (44 D.L.R. (2d) 407). The majority view seems to be that, because the union applied on its own behalf for relief under section 56, the restriction is not applicable. Bird had no right to conduct herself as she did, nor could the union expect or solicit such support. Nevertheless, the majority take the view that, because her discharge terminated this support, it incidentally affected the union's organizing campaign and therefore entitled *the union* to ask for her reinstatement. In my respectful submission, this view is fundamentally wrong and puts employers in an impossible and intolerable position. I fail to see how employer conduct which terminated assistance to which the union was in no way entitled could possibly be viewed as "interfering" with the union's organization campaign. Indeed, as I shall indicate later, it may well be that the involvement of Ms. Bird in the campaign was in itself fundamentally destructive so that it cannot be said that the termination of this involvement had any adverse effects on the trade union. In any event, I simply cannot accept that the employer has acted "contrary to the Act" when he terminated a managerial employee for conduct in which she had no right to be engaged, thus, terminating support for the trade union which it had no right to expect and was forbidden from soliciting. The unfair labour practice sections of the Act and, in particular, section 56, were intended to protect employees and trade unions from the unlawful interference with their rights under the Act. However, this is no right to managerial support recognized or protected by the Act; if anything, the reverse is true.

4. The results of managerial involvement in a trade union's organization campaign were considered in the recent case of *Veres Wire*, [1976] OLRB Rep. July 337. In that case a foreman without his employer's knowledge or consent participated in a union-organizing campaign. At p. 340, the Board remarked:

"In other words the legislation contemplates save for very narrow and restrictive circumstances (i.e., section 56) employer detachment and isolation from an applicant trade union's efforts to organize. In our view, the only posture that an employer may realistically assume in the face of the dilemma delineated is to remain aloof and neutral. *However, it does not follow from the foregoing that an employer in all circumstances may allow with impunity his managerial personnel to interfere in a union's organizational campaign.*" [emphasis added]

5. Given the view which the majority take in this case, one may well ask what an employer should do if his managerial personnel are participating in the union's organizational campaign. In the *Veres Case*, the participation of the managerial employee resulted in the rejection of the union's membership evidence even where it appeared that the foreman was acting contrary to the interests of management. The result in *Veres* was a dismissal of the union's application for certification. If Ms. Bird's support continued this might well have been the result here as well. Her active support of the trade union from the inception of the organization campaign gravel prejudices its chances of success. Surely it is ironic that the majority consider a termination of this support a threat to the "formation or existence of the collective bargaining relationship". Whatever the subjective motivations of Ms. Bird or her employer, the fact remains that "objectively" her participation creates serious problems for the trade union and raises additional hurdles which it must overcome; especially, where as here, the origination of the organization campaign was with her. Objectively then, she was acting on behalf of the employer whatever her subjective intentions might have been. Since the majority suggests that the touchstone of a section 56 violation is not "anti-union animus" but rather prejudice to the union's campaign, one is left to wonder what view they would take if the union approached either the employer or this Board in an effort to prevent further "interference".

6. This Board has always recognized that the employees themselves have an interest independent of the trade union and the employer and are entitled to select or reject a bargaining agent free from the undue influence of either of them. In *Metal Textile of Canada*, [1971] OLRB Rep. Nov. 694 at 696, the Board remarked:

"Second, there is the principle that employees are to be protected from undue influence in order that they may properly exercise their section 3 right to join a trade union of their own choice. *The result of protecting the employees may be beneficial or detrimental to the interests of the employer or to the interests of the union in an individual application depending on the facts of the particular case*; but, although the employer and the union are usually the two separate parties to the application the Board considers that the section 3 rights of the employees are protected as a separate and identifiable interest from either the employer's interest or the union's interest. Hence in a case where an employer has improperly influenced employees to sign a petition against the union, the discounting of the petition by the Board is not intended to benefit the union at the expense of the employer. It is merely to ensure that the free exercise of the rights of the employees are considered as a separate interest and are protected. Similarly, where a union exerts undue influence on employees a decision dismissing an application is not to benefit the employer at the expense of the union. Again, it is to protect the employees in the exercise of their freedom of choice under section 3 of the Act." [emphasis added]

7. Those employees *opposed to the trade union* may well be justifiably concerned if a managerial person is supporting the trade union, even if that support is not condoned by the employer. The fact remains that the managerial person can influence the economic opportunities of the objecting employees and this may impede the exercise of their right to object. While it might be said that these objectors could expose the foreman's participation to higher management, we are still left with the question of what the employer can do without running afoul of the majority's view of section 56.

8. In paras. 30 and 31 of the majority decision it is suggested that an anti-union animus is not necessary for a violation of section 56 and one need only look to the presence or absence of interference with the organizational campaign. In para. 33, however, the majority do consider the motive for the dismissal and hinged their finding of a violation of section 56 on their view that the dismissal was intended to convey an "anti-union message". I must confess some difficulty in following the majority reasons in this regard.

9. The *Labour Relations Act* is based upon the premise that labour and management have a separate and mutually exclusive community of interest. In my view, the employer is perfectly entitled to insist that there be no conflict of interest within the managerial group. An employer may dismiss a member of management who becomes involved in trade union activity and may, without prejudice, forthrightly admit that he has done so. Professor Finkleman adverted to this possibility in the *Barbara Jarvis Case* itself (see 61 CLLC ¶16,218 at p. 981). After finding that her dismissal was not justified, he remarked:

"This conclusion does not mean, however, that she was entitled to engage in activities on behalf of the union which created a conflict between her duties to the employer and her interest in the union any more than she would have been entitled, whether her status was that of employee of management, to engage in any other activity whereby such a conflict arose. So, if the motivating cause for her discharge had been that she engaged in activities that led to such a conflict, the discharge may not be treated as a violation of section 50 of the Act."

While he was dealing with section 50 [now section 58] of the Act, in my view the same logic applies to section 56.

10. In the result, therefore, I would hold that the employer was entitled to discharge Bird when she became involved in trade union activity and that neither she nor the trade union could complain since she was not exercising any right under the Act and the union could not properly require or sollicit managerial support in its organization campaign. I would hold that the impact of the discharge on the union's campaign is an incidental fact, consequent upon the exercise of a legitimate employer right and does not constitute a violation of section 56 for which the union may seek a remedy.

1126-76-R United Garment Workers of America, (Applicant), v. **Four B Manufacturing Limited**, (Respondent), v. Group of Employees, (Objectors).

Constitutional Law – Jurisdiction – Indians – BNA Act, S92(13), S91(24) – Whether Board has jurisdiction over an operation employing Indians and located on an Indian reserve – Whether the business located on the reserve is removed from provincial jurisdiction by a relationship to a federal undertaking – Whether provincial labour Board has any jurisdiction on a reserve –
– *Indian Act*, S88 – Whether jurisdiction of the Board arises under the Indian Act.

BEFORE: A. L. Haladner, Vice-Chairman, and Board Members J. D. Bell and P. J. O’Keeffe.

APPEARANCES: *Aubrey Golden, Pamela Sigurdson and Andre Bekerman for the applicant; Burton H. Kellock for the respondent; Elizabeth McIntyre for the objectors.*

DECISION OF THE BOARD: December 17, 1976.

I

1. The Board was concerned in this case with an application for certification for an all-employee unit of the respondent at its shoe manufacturing plant on Airport Road near Deseronto. That plant is located on an Indian reserve, and the majority of the employees in the unit applied for are members of the Mohawks of the Bay of Quinte Band of Indians. When the application came on for a hearing, the respondent immediately made an objection to the constitutional jurisdiction of this Board to grant certification in respect of its Indian employees. The Board’s enquiry into this preliminary matter took place over two days, and the parties were informed of the Board’s ruling some time ago. We are now providing formal reasons for that ruling.

II

2. The business of the respondent is located in the middle of the Tyendinaga Indian Reserve near Deseronto, Ontario. Of the 68 employees in the unit applied for, 48 are Band members within the meaning of the *Indian Act*, R.S.C. 1970, C.1-6, 10 are former Band members having married out of the Band, and 10 are non-Indians.

3. Four B Manufacturing Limited is owned and operated by four brothers named Brant (hence the name “Four B”), all of whom are Band members. Carl Brant, the person primarily responsible for the formation of the corporation, is President and General Manager, and his brothers, Arnold, Willard and Daniel are Directors.

4. The respondent’s business consists entirely of sewing uppers for the Bata North Star Jogger under an arrangement whereby the “Jogger” arrives from Batawa in pre-cut pieces and is then shipped back with everything attached excepting the soles.

5. The idea of an Indian-owned factory on the Reserve came from the Department of Indian Affairs after the Bata Company had asked the Department for assistance in finding a suitable location for the proposed company. In 1973, the Economic Development Branch of the Department met with the Tyendinaga Band Council to determine whether

the Reserve would be interested in owning and operating a plant which would be on contract to Bata. In 1974, the matter was put to the people of the Reserve for a vote. The majority was not in favour. Apparently, the results of the vote reflected a concern on the part of some of the Reserve residents that a Band-owned company would result in Indian lands becoming taxable.

6. It was at this point that Carl Brant, who had worked with the Band Council and the Department of Indian Affairs from the beginning of the negotiations, decided that he would own and operate the plant privately.

7. The respondent was incorporated on June 28, 1974, as an Ontario corporation, under the name Tyendinaga Mohawk Limited. However, that name was subsequently changed to Four B Manufacturing Limited. The Board was informed that the name of the corporation was changed because the Band Council felt the use of the name Tyendinaga Mohawk would not be in the best interests of the Reserve.

8. In July of 1974, the respondent rented an old aircraft hangar from the Band Council for use as a leather-sewing factory. By permit dated September 26, 1974, the respondent became entitled to occupy that site for an initial period of three years commencing September 3, 1974. In consideration thereof, the respondent was required to pay to the Band Council a fee of \$3,622.80 to cover the cost of the first year's rent. The fee for the second and third year was made subject to negotiation but was to be based on the fair market rate of rental for comparative space of industrial property in the area. The permit provides that:

"The permittee will give preference in employment to local people for work in the permit area, however, if there are not sufficient applications from the local area, the permittee shall have the right to request assistance from Canada Manpower to fill the staff requirements from the surrounding district."

9. After obtaining the aforesaid rental accommodation, the respondent approached the Department of Indian Affairs for financial assistance. The Department provided 40% of the financing based on \$7,000 per person employed, and the Department of Manpower and Immigration financed 60% of the cost of training employees for ten weeks. A bank loan was also secured by the respondent to cover 60% of the cost of supplying the factory with machines, renovating the building, and setting up the administration. Carl Brant gave evidence before the Board that prior to the commencement of operations, the Band Council spent \$24,000 to renovate the plant's premises for the purpose of assisting in the development of the business. At about this time, the respondent signed a contract with Bata for a period of five years.

10. Since its incorporation, the respondent has received from the Department of Indian Affairs and Northern Development a total of \$284,000 of which \$51,200 represents a grant and the remainder borrowed funds. Those amounts were advanced pursuant to the policies of the Department of Indian Affairs and Northern Development (the Indian Economic Development Fund). The Fund is designed to assist Canadian Indians in developing and expanding viable business opportunities, and to provide job opportunities for Indian people, both on and off reserves. Eligible applicants are individual Indians, groups of Indi-

ans, Indian bands, or or anyone who can make a contribution to the economic development of Indian people.

11. The respondent has been operating for more than a year now and, although there are plans to expand the plant to accommodate a new line of machines designed for the production of the Bata moccasin, it has yet to show a profit. In his testimony before the Board, Mr. Brant made it clear that any future profits of the corporation would go to himself and his brothers and not to the Band Council or the Tyendinaga Reserve.

12. Finally, it should be noted that the respondent has not made any deductions for the employees who are members of the Band with respect to income tax or Canada Pension Plan contributions.

III

13. This unique factual picture – a commercial enterprise located in the middle of an Indian reserve, owned and operated by Indians and employing for the most part Indian employees – raises an important constitutional issue as to the scope of provincial jurisdiction over the labour relations of Indians employed on an Indian reserve. Although the Board has previously issued certificates covering both reserve and non-reserve Indians, recent constitutional developments outside the field of labour relations, and in particular the decisions of the Supreme Court of Canada in *Cardinal v. A.-G. Alta.* (1974), 40 D.L.R. (3d) 533, and *Natural Parents v. Superintendent of Child Welfare et al.* (1976) 60 D.L.R. (3d) 148, have made the issue of the Board's jurisdiction over Indians somewhat more complex than it formerly appeared. Since this is the first occasion upon which we have been required to consider the effect of those two Supreme Court decisions upon the reach of the provincial Labour Relations Act, it is appropriate that we review at the outset the basic purposes and general scheme of that Act.

14. The fundamental policy of the Ontario Labour Relations Act, enshrined in the preamble to the Act itself, is that free collective bargaining is the preferred method of settling the terms and conditions of employment between employers and employees in the Province. To that end, the Act establishes procedures for certification by which employees can join together through the vehicle of trade union representation and thereby obtain the right to bargain as a group with their employer. The Act proscribes certain practices to protect the basic right of employees to organize and select a bargaining agent of their choice and also mandates certain procedures and conduct to encourage and regulate the collective bargaining relationship once established. As well, the Act confides to the Board, which is the agency primarily responsible for the administration and interpretation of the statute, a remedial jurisdiction to ensure compliance with the Act and to remedy violations.

IV

15. Turning now to the constitutional issues raised by this case, we can begin with a brief outline of the constitutional framework in the field of labour relations. *Prima facie*, labour relations is in relation to "property and civil rights in the province", a subject reserved to the provincial legislatures by section 92(13) of the British North America Act (that principle was established by the Judicial Committee of the Privy Council in *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396). However, it is not within the competency of the

provincial legislatures to regulate the labour relations of employers and employees whose operations fall within the legislative jurisdiction of the Parliament of Canada under section 91 (as the Supreme Court of Canada held in *Eastern Canada Stevedoring Company*, [1955] 3 D.L.R. 721). That division of authority:

“...is based on an initial conclusion that insofar as [labour relations] have an independent constitutional value they are within provincial competence; and, secondly, insofar as they are merely a facet of particular industries or enterprises their regulation is within the legislative authority of that body which has power to regulate the particular industry of enterprise...” [Laskin’s *Canadian Constitution Law* (4th ed.), at p.363.]

V

16. With these general principles in mind, we now turn to the specific constitutional problem at hand. Notwithstanding the unique factual characteristics of this dispute, it is clear, on the face of it, that the respondent is not carrying on an undertaking which falls within the legislative jurisdiction of Parliament. The respondent operates a small private business which is engaged exclusively in the process of sewing uppers for running shoes. As a commercial shoe manufacturing operation or part thereof, it is subject to the regulatory authority of the province of Ontario, the jurisdiction in which it was incorporated. Although owned and operated by Indians and located on an Indian reserve, the evidence establishes that there is nothing “Indian” about the kind of business which the respondent is operating. On the contrary, it is the kind of industrial enterprise which can and is being carried on throughout the Province by non-Indians. It is true that most of the respondent’s employees are Indians and that Indians are granted a preference with respect to employment. But the fact is that non-Indians are being employed. We would point out as well that the employees of the respondent have organized themselves in the same fashion as have employees employed in enterprises having no connection whatever with Indians. The presence of the union here is simply the result of the economic development which has taken place on the Reserve.

17. It would seem to follow from this that the labour relations of the employees engaged in the business of Four B Manufacturing Limited are a matter of “property and civil rights within the province” and thus within the jurisdiction of the Ontario Board.

VI

18. But the respondent contended that section 91(24) of the B.N.A. Act which excludes from provincial jurisdiction “Indians and lands reserved for the Indians” operates to deprive this Board of jurisdiction to grant certification in respect of the unit for which the applicant is seeking bargaining rights.

19. There are two distinct legal perspectives from which this objection of the respondent can be viewed. First, the respondent’s objection can be looked at from the viewpoint of the current constitutional rules in the field of labour relations. Secondly, it can be looked at from an external perspective which renders the traditional rules irrelevant. That is the perspective which the respondent urged upon us in this case.

VII

20. Dealing first with the existing jurisdictional doctrines – the typical constitutional case in the field of labour relations turns essentially on the question of whether the employer's undertaking falls within federal or provincial jurisdiction under the B.N.A. Act. If that undertaking is within provincial competence, so also are the labour relations of the employees engaged therein and vice versa.

21. While the allocation of the employer's undertaking is normally a simple matter to resolve, problems have arisen where the employer is engaged in an activity which, although itself provincial in nature, is nonetheless related to an undertaking which is subject to federal regulatory control. It should be noted here that the *Canada Labour Code* extends to "employees who are employed upon or *in connection with* the operation of any federal work, undertaking or business."

22. The jurisdiction of a provincial labour board over the labour relations of an operation which is alleged to be removed from provincial jurisdiction because of its relationship to a federal undertaking has been the subject of a number of Court decisions (see for example, *C.P.R. v. A.-G. B.C.*, (the Empress Hotel case) [1950] W.W.R. 220 (P.C.); *Re Northern Electric Company Limited and United Electrical, Radio and Machine Workers of America, et al.*, [1963] 2 O.R. 301; and *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers et al.*, [1974] 40 D.L.R. (3d) 105). The approach taken by the Courts in cases of this kind is a functional one which focuses on the factual character of the particular operation and not on the technical legal niceties of the corporate structure or the employment relationship. In order for provincial jurisdiction to be excluded, the Courts have said that the operation whose labour relations is at issue must be an integral part of or necessarily incidental to the operation which is within the dominion jurisdiction.

23. While an Indian reserve is not an "industry" or "enterprise" in the usual commercial sense, there can be no doubt that it is within the classes of subject assigned to the federal Parliament by the B.N.A. Act (*St. Catharines Milling case* [1889], 14 App. Cas. 46) and that it has the capacity to act as an employer. Given those attributes, it can certainly be said to justify a federal labour relations presence. If that is the case, then employees engaged in the actual operation or administration of the Tyendinaga Reserve would be governed in their labour relations by the *Canada Labour Code* and not the Ontario Labour Relations Act. [No doubt it was on that basis that the Canada Labour Relations Board certified *The Public Service Alliance of Canada* as the bargaining agent for a unit of employees of the Qu'Appelle Indian Residential School Council (see *The Public Service Alliance of Canada* [1974] 2 D.I.4).].

24. But that is not the type of unit which is the subject of the instant application. We are here concerned with an application for certification in respect of a group of employees engaged exclusively in the work of a commercial shoe manufacturing business, albeit one which is located within the boundaries of an Indian reserve. Accordingly, if the jurisdiction of this Board is to be ousted, it must be established that the operation of the respondent can be considered part of the operation of the reserve to such a degree that it is pulled within the ambit of Parliament's legislative authority over Indian Reserves under section 91(24) of the B.N.A. Act.

25. Although there is no judicial authority directly on point, there is one decision of this Board that is. The Board's decision in *Yellow Jacket Welding Company* [1974] OLRB Rep. Oct. 709, appears to be the only reported case (labour board or otherwise) which has expressly dealt with the question of the scope of the provincial labour relations jurisdiction over Indians employed on an Indian reserve.

26. In *Yellow Jacket*, the applicant was seeking bargaining rights for a unit of employees of the respondent engaged in the construction of a storage facility for Canada Lafarge Cement Ltd. The project was located on the Whitefish Indian Reserve, and while the majority of the employees were non-Indians, some of the employees were Indians and residents of the reserve. In holding that "neither the fact that the job site was on an Indian reservation nor the fact that Indians might be affected by the application as employees of the respondent was sufficient to deprive the Board of jurisdiction to entertain the application", the Board determined that the test to be applied was one of function. On that test "there was no indication before the Board that the storage facility was necessarily incidental to the operation of the Indian reserve."

27. Although there are certain factual differences between the *Yellow Jacket* case and the situation before us, we do not view these differences as constitutionally significant. The employees of Four B are all engaged in the work of the leather-sewing operation which comprises the entire business of the respondent. Can this leather-sewing operation be said to be an integral part of or necessarily incidental to the operation of the reserve upon which it is located? Surely not simply on the grounds that it is owned by Indians and receives financial assistance from the Government of Canada. The first point to be made in this context is that we attach no particular significance to the fact that the respondent is a corporate entity. The determination of the relationship between the employer's operation and the relevant federal undertaking must be based on functional considerations and not on the niceties of corporate ownership. The Board is entitled to pierce the corporate veil to determine the real identity of the employer, but when that is done, it can readily be seen that the respondent's operation is not in any functional sense an "Indian" one (as appears to have been the case in *The Public Service Alliance*, supra). The business of the respondent is owned by four brothers all of whom are members of the Mohawks of the Bay of Quinte Band of Indians. But the evidence establishes that the respondent is neither owned nor in any way controlled or directed by the Tyendinaga Band Council or the Reserve itself. For whatever taxation or other reasons, it is clear that the respondent's business is an undertaking which the Reserve decided not to assume. Moreover, the evidence establishes that the Band Council did not want the name of the Reserve associated with the name of the respondent, and that as a result of the Band Council's concern, the respondent changed its name from Tyendinaga Mohawk Limited to Four B Manufacturing Limited. More importantly, the evidence establishes that neither the Band Council nor the Reserve itself will share in the profits of the respondent should such profits materialize. Mr. Brant's evidence was that any future profits of the respondent would go to himself and his brothers as the sole shareholders of the Corporation.

28. As far as the fact of Federal Government assistance is concerned, it is clear that the Government has an interest in the economic development of Indians generally and in the business of the respondent specifically. But that certainly cannot be said to exclude the jurisdiction of this Board. There are a great many employers in the Province receiving federal assistance by way of loan or grant, and it has never been suggested that this state of

affairs is relevant to the issue of our constitutional jurisdiction. We might note here as well that under the policy of the Indian Economic Development Fund, Indian status is not a prerequisite for financial assistance. The only requirement for assistance from the Fund is that the applicant can make a contribution to the economic development of the Indian people.

29. Although the respondent did not adduce evidence on this point, it was conceded by the applicant, and the Board is prepared to assume, that the business of the respondent does indeed contribute to the economic development of the Indians of the Tyendinaga Reserve (by providing opportunities for employment, and the development of trade and entrepreneurial skills, and no doubt as well by supplying a general economic stimulus). Be that as it may, it does not make the respondent's leather-sewing operation an integral part or necessarily incidental to the operation or administration of the Reserve as such; and as counsel for the applicant pointed out, the same economic benefits would likely have fallen to the Reserve had the respondent's business been located just outside its boundaries.

30. It is therefore our conclusion that as a matter of function (as well as of *de facto* ownership, control and direction) the respondent is a distinct and separate operation from that of the Reserve upon which it is situate.

31. Although not precisely analogous to the Four B situation, the decision of the Privy Council in the *Empress Hotel* case (*supra*) buttresses the legal conclusion we have reached. In that case, the Judicial Committee ruled that the the employees of the Empress Hotel in Victoria were governed by the provincial and not the federal "hours of work" legislation. The Committee entertained no doubt that the Canadian Pacific Railway Company, which owned and operated the hotel, was under federal jurisdiction insofar as its railway undertaking was concerned. However, the Committee was of the view that the hotel, while undoubtedly of benefit to the railway, was not something that was necessary to the operation of the railway as such. We find that the same conclusion applies to the relationship between the operation of the respondent and the operation of the Tyendinaga Indian Reserve.

32. There is one other judicial decision to which we should refer by way of contrast. In the *Letter Carriers'* case (*supra*), the Supreme Court of Canada held that the employees of a Saskatchewan trucking firm, whose activities were for the most part confined to the handling and carriage of mail for the Canada Post Office, came under the federal jurisdiction notwithstanding the fact that they occasionally moved furniture within the Province for others than the Post Office. In the Supreme Court's view, the very limited involvement of the employees in "non-federal work" was not sufficient to clothe the Labour Relations Board of Saskatchewan with jurisdiction.

33. As must be apparent, the Four B situation is dramatically different from the one just described. The involvement of the employees of the respondent in provincial work can hardly be characterized as limited. On the contrary, their work is, in its entirety, provincial.

34. That is the response to the respondent's objection which is required by current constitutional law. We hold as a matter of labour relations law that this Board does have the constitutional jurisdiction to entertain the union's application for certification.

35. We now turn to the part of this case which makes it quite extraordinary as a labour relations constitutional case. As indicated earlier, the respondent did not frame its challenge to the jurisdiction of the Board in terms of the accepted constitutional law doctrines in the field – that the employees were removed from the provincial labour relations sphere because of their employment in a federal industry or enterprise or in an industry or enterprise which is an integral part thereof. Indeed, counsel made no effort to argue that the business of the respondent was an integral part of or necessarily incidental to the Tyendinaga Reserve.

36. The respondent's argument against the Board's jurisdiction was premised on the assumption that its employees are, by virtue of their status as reserve Indians, completely immune from the application of provincial laws. As counsel put it, what is done by Indians on an Indian Reserve is of no concern to the Ontario Legislature. On this theory of jurisdiction, the labour relations of Indians on a reserve would be subject to federal regulation, irrespective of the nature of the employer's business and irrespective of the functional relationship of that business to a federal regulatory concern. But simply because the exclusive powers of the Parliament of Canada to legislate in relation to Indians and Indian lands puts the labour relations of Indians on an Indian reserve beyond provincial legislative competence. In the respondent's submission, in order for the Ontario Labour Relations Act to have application to Indians on a reservation, there must be federal enabling legislation – otherwise the province has no jurisdiction.

37. Before dealing specifically with this aspect of the respondent's objection, we might comment briefly on the role which we believe befits an administrative tribunal such as the Board in matters of constitutional law. It is clear that this Board has the authority to interpret the B.N.A. Act in order to determine whether we have jurisdiction over the matter which has been referred to us by the applicant (see *Northern Electric*, supra). But it is equally clear that the Board, as an inferior tribunal, can never have the final say in matters of constitutional law (as we recently stated in a different context in the *Domglas* case [1976] OLRB, Oct. Rep.). In our opinion, it follows from this that the Board should adopt a conservative approach to the interpretation of the B.N.A. Act and should not engage in unrestrained constitutional innovation. The argument which the respondent has advanced in this case is nothing if not a novel one, and, if accepted, would establish a new legal basis for federal regulation in the field of labour relations. Accordingly, we would have to be clearly satisfied that it is required before giving it effect. In our opinion, if there is to be a constitutional development in the area, it should be undertaken by the Courts and not by the Board anticipating what the Courts *might* do.

38. With these preliminary remarks about the degree of adjudicative activism which is appropriate to a labour relations board in matters of constitutional law, we now respond directly to the respondent's contention as to the special legislative immunity enjoyed by reserve Indians by reason of s.91(24). In the first place, the proposition that Indians on an Indian reserve are totally excluded from the application of general provincial laws was specifically rejected by the Supreme Court of Canada in the *Cardinal* case (supra). In *Cardinal*, an Indian, while on a reserve, sold a piece of moose meat and was charged with, but acquitted of an offence under the *Alberta Wildlife Act*, namely trafficking in big game, on the ground that the Act was *ultra vires* of the Alberta Legislature in its application to Indians on a reservation. When the case reached the Supreme Court, three of the Justices (The Chief Justice, Mr. Justice Hall and Mr. Justice Spence) expressed the view that:

“...Apart entirely from the exclusive power vested in the Parliament of Canada to legislate in relation to Indians, its exclusive power in relation also to Indian reserves puts such tracts of land, albeit they are physically in a Province, beyond provincial competence to regulate their use or to control the resources thereon.”

In that sense:

“Indian reserves are enclaves which, so long as they exist as reserves, are withdrawn from provincial regulatory power.”

39. But that view as to the effect of s.91(24) upon the reach of provincial regulatory authority was not the view of the majority of the Supreme Court. In holding that the Alberta *Wildlife Act* was not *ultra vires* of the Province in its application to Indians on an Indian reserve, Mr. Justice Martland, with whom Mr. Justices Fauteux, Abbott, Judson, Ritchie, and Pigeon concurred, stated:

“A provincial Legislature could not enact legislation in relation to Indians, or in relation to Indian reserves, but this is far from saying that the effects of s.91(24) of the British North America Act, 1867, was to create enclaves within a Province within the boundaries of which provincial legislation could have no application. In my opinion, the test as to the application of provincial legislation within a reserve is the same as with respect to its application within the Province and that is that it must be within the authority of s.92 and must not be in relation to a subject-matter assigned exclusively to the Canadian Parliament under s.91. Two of those subjects are Indians and Indian reserves, but if provincial legislation within the limits of s.92 is not construed as being legislation in relation to those classes of subjects (or any other subject under s.91) it is applicable anywhere in the Province, including Indian reserves, even though Indians or Indian lands might be affected by it. My point is that s.91(24) enumerates classes of subjects over which the federal Parliament has the exclusive power to legislate, but it does not purport to define areas within a Province within which the power of a Province to enact legislation, otherwise within its powers, is to be excluded.”

40. Although decided before *Cardinal*, the decision of the Ontario Court of Appeal in *R. v. Isaac* [1973] 3 O.R. 833 is of considerable significance here. In that case, the Court of Appeal decided that provincial traffic legislation could have application within the confines of a reserve.

[We realize of course that the constitutional issue before the Court in *Isaac* was whether a federal statute (s.73(1)(c) of the *Indian Act*, providing for regulations “for the control of the speed, operation and parking of vehicles on roads within reserves” and s.6 of the *Indian Reserve Traffic Regulations*, enacted thereunder, providing that drivers of vehicles on reserves shall comply with all provincial laws”) could adopt by reference subsequently enacted provincial traffic legislation (s.8(1) of the *Highway Traffic Act* and s.3(1) of the *Motor Vehicles Accidents Claims Act*) without thereby violating the constitutional ban on inter-del-

egation. However, it is implicit in the Court's reasoning that the provincial Acts in question would have applied as provincial law in the absence of Parliament's effective anticipatory adoption by reference.]

41. In our opinion, the foregoing analysis is sufficient to refute the general proposition that provincial laws can never have application to reserve Indians in the absence of federal enabling legislation. Until recently, it would have been sufficient also to resolve the question of whether the Ontario Labour Relations Act can apply to regulate the labour relations of Indians employed on a reserve. [The Ontario Labour Relations Act is not legislation in relation to Indians or Indian lands. It is rather in relation to the labour relations of employers and employees without regard to their race, creed, colour, nationality or place of origin and, as has already been pointed out, the constitutional jurisdiction of a provincial legislature to deal generally with the subject of labour relations within the province is clear and beyond question (*Toronto Electric Commissioners v. Snider*, supra).] However, in light of the decision of the Supreme Court of Canada in *Natural Parents* (supra), it would appear that further analysis is now required.

42. The *Natural Parents* decision stands for the proposition that provincial laws of general application – laws which do not single out Indians for special treatment but apply generally to the residents of a province – are not a *a fortiori* valid and applicable as against Indians. In *Natural Parents*, the first issue before the Court was whether the *Adoption Act* of British Columbia, dealing generally with the subject of adoption in that Province, could apply, of its own force, to the adoption of Indians. The essence of the Court's reasoning on that issue is contained in this key passage from the judgment of the Chief Justice (with whom Mr. Justices Judson, Spence, Dickson and DeGrandpre concurred):

“*Ex facie*, ... the *Adoption Act* did not purport to extend to areas of exclusive federal competence, e.g., Indians. It could only embrace them if the operation of the Act did not deal with what was integral to that head of federal legislative power, there being no express federal legislation respecting adoption of Indians. It appears to me to be unquestionable that for the provincial *Adoption Act* to apply to the adoption of Indian children of registered Indians, who could be compelled thereunder to surrender them to adopting non-Indian parents, would be to touch ‘Indianness’, to strike at a relationship integral to a matter outside of provincial competence ...

Counsel for the respondents cited a number of cases holding Indians to be subject to provincial legislation. Among them was *R. v. Hill* (1907), 5 O.L.R. 406, and *R. v. Martin* (1917), 39 D.L.R. 635, 41 O.L.R. 79. These, and other like cases are simply illustrative of the amenability of Indians off their reservations to provincial regulatory legislation, legislation which, like traffic legislation, does not touch their ‘Indianness’. Such provincial legislation which would, if applicable as provincial regulation *simpliciter*, constitute a serious intrusion into the Indian family relationship. It is difficult to conceive what would be left of exclusive federal power in relation to Indians if such provincial legislation was held to apply to Indians. Certainly, if it is applicable because of its so-called general application, it would be equally applicable by expressly

embracing Indians. Exclusive federal authority would then be limited to a registration system and to regulation of life on a reserve.

The fallacy in the position of the respondent in this case and, indeed, in that of all the intervenors, including the Attorney-General of Canada, is in the attribution of some special force or special effect to a provincial law by calling it a "provincial law of general application", as if this phrase was self-fulfilling if not also self-revealing. Nothing, however, accretes to provincial legislative power by the generalization of the language of provincial legislation if it does not constitutionally belong there."

43. The significance of the Supreme Court's decision in *Natural Parents* for our purposes is that it can no longer be asserted that merely because the Ontario Labour Relations Act is provincial in scope and otherwise within the competence of the Ontario legislature that it can have application to Indians. Such a conclusion should only be drawn after it is established that the Ontario Act does not deal with matters integral to that group of people. In the words of Mr. Justice Laskin, the Act must not be found to touch "Indianness".

44. In *Natural Parents*, the provincial Act in question affected Indians in a very real and significant respect in that it would have applied to permit the adoption of Indian children by non-Indian parents with the loss of Indian identity and family relationship which adoption entails. Here, the Labour Relations Act if applied would simply allow the Indian employees of the respondent to come together and obtain the benefits of a process which is generally available to the residents of the Province. In our view, there is nothing inherently Indian about collective bargaining, and we fail to appreciate how Indians by engaging in that process would in any way be deprived of their "Indianness". The only protected characteristic of Indians *qua* employees that we can discern is that they are not subject to Federal Income Tax and are not required to contribute to the Canada Pension Plan. There were no representations before the Board that this financial immunity would be diminished by their becoming subject to the collective bargaining laws of the Province. In short, it is our opinion that the inclusion of Indians within the scope of the Ontario Labour Relations Act would touch them as ordinary citizens and in a way that would not intrude on their Indian character or their Indian identity or relationship (to paraphrase the language of Mr. Justice Laskin in *Natural Parents*).

45. In our view, the Ontario Labour Relations Act (in contrast to the British Columbia *Adoption Act*) stands on the same constitutional footing as provincial traffic legislation, legislation which does not, in the opinion of at least five Justices of the Supreme Court of Canada, touch the "Indianness" of Indians. (See the passage from the Chief Justice's judgment in *Natural Parents* just quoted.) Lest there be any confusion on this point, it should be emphasized that we do not construe the use of the qualifying phrase "off their reservations" as a suggestion by the Chief Justice that provincial traffic legislation can never apply of its own force to Indians *on* their reservations. The two cases to which Mr. Justice Laskin refers are cases in which an Indian was convicted under a provincial statute in respect of his conduct off the reservation (hence the qualification noted above). In *R. v. Hill* and *R. v. Martin*, Indians were convicted respectively for practising medicine without compliance with the provincial Medical Act and for possession of liquor contrary to the provincial Temperance Act. In both of those cases, the Court took care to leave open for future decision the ques-

tion of the applicability of the provincial enactment to Indians on a reserve. But as one commentator has pointed out, neither enactment could be said to bear any obvious relationship to Indians (or for that matter to "lands reserved for the Indians") and it is therefore not apparent why the results should have been different – had the Courts been required to decide the question – if the accused Indian in either case had in fact been on the reserve at the material time (See in this regard and generally Lysyk, K. "The Unique Constitutional Position of the Canadian Indian" (1967) 45 Can. Bar Rev. 513).

46. We are confirmed in our conclusion as to the amenability of Indians both on and off their reservations to provincial traffic legislation by the decision of the Ontario Court of Appeal in *R. v. Isaac* (supra).

47. Before leaving this issue, we would add these further comments about the significance of the Supreme Court's decision in *Cardinal*. As noted earlier, the Chief Justice's conception of an Indian reserve as an "enclave" did not receive the approval of the majority of the Supreme Court in *Cardinal*. It will be remembered that the Court there held that the test as to the application of provincial legislation to Indians on a reserve was the same as with respect to its application within the province – that it must be within the authority of s.92 and must not be in relation to Indians or Indian lands. The *Cardinal* decision has not been overruled, and unless and until it is, it constitutes a binding precedent on this Board. But having said that, we are not unaware of the possibility that the approach of the Court in *Natural Parents* (focusing as it did on the question of whether the provincial legislation dealt with matters integral to the relevant part of s. 91(24) rather than simply on the question of whether the legislation was in relation to Indians or Indian lands) could be read as signalling a retreat from its position in *Cardinal*. We therefore wish to record our opinion that had the view of the Chief Justice prevailed in *Cardinal* (as it did in *Natural Parents*) it would not have affected our decision here. Mr. Justice Laskin made it very clear in his dissenting judgment in *Cardinal* that his comments as to the effect of section 91(24) upon the reach of provincial regulatory legislation were confined to laws in relation to matters integral to Indian lands as such, which laws, like provincial game laws, control the regulation and administration of the resources of land comprised in an Indian reserve. In this regard, it should be noted that there is no mention of an Indian reserve as an "enclave" in the Chief Justice's judgment in *Natural Parents*. As we have been at pains to make clear in this decision, the Ontario Labour Relations Act is a collective bargaining statute. As such, it is not concerned in any significant respect with the regulation or administration of land (and thus does not resemble the statute in *Cardinal*). The Act does, as counsel for the respondent noted in his argument, regulate certain matters pertaining to the use of land. (Under s. 92 (f) the Board has power to enter the premises of employers and conduct representation votes during working hours; and under s. 10, where employees of an employer reside on the property of the employer, or on property to which the employer has the right to control access, the Board may direct the employer to allow a union access for the purpose of attempting to persuade the employees to join a union.) But those provisions are designed for the limited purpose of ensuring the basic freedom which the Act guarantees to employees – The freedom to make a free and informed choice about collective bargaining. Not only is this aspect of the Board's regulatory authority incidental in character, it is of limited scope and duration. If the Ontario Labour Relations Act is to have any direct effect on the Tyendinaga Reserve lands, it will affect them not as Indian lands *per se*, but rather as lands which have been rented by the respondent from the Band Council for use as industrial property. And even as to that, the regulation will be a temporary one with no diminution of reserve resources In

short, it would be our opinion – were that opinion necessary – that the Labour Relations Act does not deal with matters integral to Indian lands in the sense comprehended by Mr. Justice Laskin's dissent in *Cardinal*.

48. Our conclusions on this preliminary matter of jurisdiction may be summarized as follows:

We are of the view that the question of whether the Ontario Labour Relations Act applies to regulate the labour relations of Four B Manufacturing Limited (and thus whether this Board has jurisdiction over the labour relations of the Indians who are employed in that operation) falls to be determined by reference to the doctrines of constitutional law which have always been applied in the field of labour relations. More specifically, we are of the view that the test for determining the subject matter of the labour relations of the employees in the unit applied for is a functional one. On that test, we are not persuaded on the evidence before us that the leather-sewing operation of the respondent is an integral part of or necessarily incidental to the operation of the Tyendinaga Indian Reserve and so is within the federal jurisdiction.

To the extent that the decision of the Supreme Court of Canada in *Natural Parents* has expanded the scope of s. 91(24) of the B.N.A. Act (and made the leap from the proposition that a provincial law is of general application, and otherwise within the competence of the provincial legislature, to the conclusion that it can have application to Indians on a reserve no longer automatic), the only limitation on the competence of a provincial legislature to enact legislation which, although not in relation to Indians, or Indian lands, nevertheless affects Indians is that it must not enact laws which deal with matters integral to that specific group of people. In the words of Chief Justice Laskin, provincial laws must not touch "Indianness". Applying that principle to the situation before us, it is our conclusion that the Ontario Labour Relations Act has nothing at all to do with the "Indianness" of the Indians who are the subject of the union's application for certification. As a collective bargaining statute, the Act is not concerned with the status of these people as Indians. It is rather concerned with their position as employees as between themselves and their union and vis-a-vis their employer.

If there exists a concern that the Courts will in the future adopt an even more expanded interpretation of the federal jurisdiction under s.91(24) and hold that Parliament alone has power to regulate the labour relations of Indians employed in enterprises which are not functionally related to a federal industry or enterprise, they would clearly constitute a new constitutional development. We do not mean to imply by this that constitutional law in the field of labour relations is forever frozen in its current state. Our point is simply that developments in constitutional law should, in the absence of compelling legal authority, be left to the Courts who are the ultimate authorities on such matters.

49. Accordingly, we hold both as a matter of constitutional law and as a matter of institutional policy that this Board does have the jurisdiction to certify the employees of the respondent who are in the bargaining unit sought by the applicant.

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50. We should note in closing that the Board in this case heard a great deal of argument as to the effect of s.88 of the Indian Act. That section provides as follows:

"Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act."

Our conclusion on s.88 can be stated simply. That section is of no relevance to the constitutional issues before us. It can neither restrict nor expand the jurisdiction of this Board. The reasons for this conclusion are as under.

51. First, the *Indian Act* does not purport to deal with the subject of labour relations, and there were no representations before the Board that labour relations was the subject of any order, rule, regulation or by-law made thereunder. The Board was informed by Mr. Brant that the Band Council of the Mohawks of the Bay of Quinte at a meeting held on October 6, 1976, (just 9 days after the union's application for certification was received by the Board) passed the following motion:

THAT this Council agrees that no national or international union be formed on the Tyendinaga Reserve Number 38.

However, counsel did not contend that the effect of that by-law was to oust the jurisdiction of this Board to grant certification in respect of its employees. In any event, we hold that the by-law does not have this effect.

52. Secondly, before the decision of the Supreme Court of Canada in *Natural Parents*, the conventional legal wisdom was that s.88 of the *Indian Act* merely defined the obligation of obedience that Indians owed to provincial law – that Indians were to be governed by general provincial laws, except to the extent that those general laws were inconsistent with the *Indian Act* or related to any matter for which provision was made thereunder. That was essentially the position adopted by this Board in the *Yellow Jacket* case. However, this interpretation of s.88 was not accepted by the Supreme Court in *Natural Parents*. The Court there held that s.88 of the *Indian Act* operates to make applicable to Indians provincial laws which, for constitutional reasons, would not otherwise apply to them. In the Supreme Court's view, the effect of the section in the *lis* before it was to referentially incorporate the B.C. Adoption Act into the *Indian Act* as federal law. As we read *Natural Parents*, s.88 only comes into play when a provincial law is beyond the competence of the provincial legislature to the extent that it is sought to be applied to Indians. Since our decision in this case is that the Ontario Labour Relations Act can constitutionally have application to Indians, both on and off their reservations, we must conclude that s.88 is of no relevance to the issues before us.

1127-76-U Paul Stuckey, (Complainant), v. Local 1967 of the International Union United Automobile Aerospace and Agricultural Implement Workers of America (UAW-CLC) and **Douglas Aircraft Company of Canada Ltd.**, (Respondents).

Duty of Fair Representation – S60 – Whether provision and application of a “super-seniority” clause in collective agreement granting union officers special status a violation – Whether actions not in themselves discriminatory that may result in discrimination are prohibited – Whether hostility or ill will must be present to find discrimination.

BEFORE: Pamela C. Picher, Vice-Chairman.

APPEARANCES: *Ivan St. Clair Sequeira and Paul Stuckey for the complainant; Lennox A. MacLean, Larry Sheffe and Thomas Johnston for the respondent union; J.B. Noonan and J.D. Dollery for the respondent company.*

DECISION OF THE BOARD: December 3, 1976.

1. This is a complaint under section 79 of The Labour Relations Act.
2. At the commencement of the hearing the complainant, Mr. Paul Stuckey, requested leave to amend the complaint to include a specific allegation against the respondent company. From the outset the company had been named as a respondent and, over the objection of the employer, the Board granted the complainant leave to amend his complaint.
3. With the amendment, the complainant alleged that he had been dealt with by the respondent union contrary to the provisions of section 60 of the Act and that he had been dealt with by the respondent company contrary to the provisions of section 58(b) of the Act. The complainant requests that articles 48(b) and (c) be struck from the collective agreement.
4. The presently effective collective agreement between the respondent union, Local 1967, and the respondent company, Douglas Aircraft Company of Canada Ltd., contains a super-seniority provision (article 48) which reads as follows:

“48. In order that the operations of the Union as authorized on Company premises, will not become disorganized when lay offs are being made, the Company agrees to the following procedures: –

- (a) The Plant Chairman and any member of the Local Executive Board shall be the last person who is removed from his classification during his term of office so long as he is qualified to perform the work available. Thereafter he will be subject to all bumping provisions except that he will not be laid off during his term of office so long as full time work at his own level or a lower wage level is available which he is qualified to perform.

- (b) Subject to (a) above, A Zone Committeeman shall be the last person who is removed from his classification in the Zone in which he is recognized as holding Union representation. Thereafter he will be subject to all bumping provisions except that he will not be laid off during his term of office so long as full time work is available in his Zone at his own level or a lower wage level which he is qualified to perform.
- (c) Except for (a) and (b) above, a Shop Steward shall be the last person who is removed from his classification in the area of the Zone in which he is recognized as holding Union representation. Thereafter he will be subject to all bumping provisions except that he will not be laid off during his term of office so long as full time work is available in his area of his Zone at his own level or at a lower wage level which he is qualified to perform.
- (d) In the event of two shift operators, the members of the Union Executive Board, the Chief Steward and the Zone Committeeman will have a choice of shifts. The President shall decide which shift shop stewards work, provided it does not affect the efficient operations of the plant, and will notify the Company of the names of Shop Stewards on night shift and their area of representation.
- (e) Shop Stewards and Zone Committeemen will only be recognized in the area in which they possess acknowledged jurisdiction. It is understood that there may be occasions when a Shop Steward or Zone Committeeman will be required to follow through a written grievance outside his jurisdiction if such grievance originated within his area. Permission for this purpose will have to be secured and restricted within the Plant. In the absence of a Shop Steward or Zone Committeeman an alternate may be appointed and the Manager, Labour Relations, will be notified of the temporary change."

The complainant alleges that through the inclusion of clause 48 (b) and (c) in the collective agreement, Local 1967 has violated section 60 of the Act in that it has breached its duty of fair representation by acting in a manner that is discriminatory in its representation of its employees in the unit. The complainant was careful to emphasize that he was not alleging that the union had acted in a manner that was either arbitrary or in bad faith but was limiting his complaint to an allegation of discrimination. The complainant further emphasized that he does not find clause 48(a) discriminatory but only 48(b) and (c). In other words, Mr. Stuckey is not objecting to a super-seniority clause for the Plant Chairman and Local Executive Board [48(a)] but only for the Zone Committeemen and Shop Stewards [48(b) and (c)].

5. Against the employer, the complainant alleged that the employer violated section 58(b) of the Act in that Douglas Aircraft imposed a condition in a "contract of employment" that sought to restrain the complainant from exercising a right under the Act, that right being, according to the complainant, the right under section 60 to be represented by the trade union in a manner that is not arbitrary, discriminatory, or in bad faith.

6. Since the success of the complainant's allegation against the employer is dependent upon a finding against the union under section 60, the Board will address the section 60 complaint first. If it finds that there has been no violation of section 60 it will not be necessary to explore the complaint against the employer as that complaint is based on the presumption that the union has violated section 60.

7. Mr. Paul Stuckey is a press operator at the Douglas Aircraft Company in Malton, Ontario. He has been a member of the representing union throughout his employment. When he was hired in 1964 the employees were represented by Local 112. In 1967, in honour of Canada's birthday, a new local, local 1967, was formed for the employees of Douglas Aircraft. Mr. Stuckey was laid off in June 1976 which is the immediate event giving rise to the objections registered in this complaint.

8. Indirect and vague references of union misrepresentation were made by Mr. Stuckey against Local 1967. Although from the representations of counsel for the complainant these allegations did not appear to form any part of the actual complaint of discrimination under section 60, we will, because of their obvious importance to the complainant, address them briefly with a view to determining whether the union engaged itself in discriminatory conduct towards Mr. Stuckey during the course of its negotiations for the existing collective agreement.

9. The evidence of both Mr. Johnston, the president of Local 1967, and Mr. Stuckey indicated that the union's ordinary negotiating procedures were followed through the entire negotiating period. However, Mr. Stuckey implied in his testimony that he never had a chance to object to the inclusion of the super-seniority clause in the most recent collective agreement. He complained that the leaflets handed out prior to the ratification meeting referred only to monetary and fringe benefit provisions and did not indicate that a super-seniority provision would be included in the collective agreement. Mr. Johnston testified that the union's practice was to include in the ratification meeting leaflet only those matters that were actively being negotiated. As nothing in evidence caused the Board to suspect that the union had not followed its normal negotiation procedures or that it had attempted to mislead its members by not mentioning the super-seniority clause in the leaflet, the Board accepts that the reason the clause was not mentioned in the leaflet was because it was not the subject of proposed changes to the collective agreement. Drawing on all the relevant evidence the Board is further of the view that Mr. Stuckey would have been free to raise the matter of super-seniority at any time during negotiations (either on the open questionnaire distributed by the union prior to the onset of negotiations to solicit suggested topics of negotiation or at the pre-negotiation membership meeting or at the post-negotiation ratification meeting) but that he at no time chose to voice his objection through these channels. When specifically asked about the pre-negotiation membership meeting prior to the current collective agreement, he stated on cross-examination that he made no suggestion for amending the collective agreement. While Mr. Stuckey complained that he never received a questionnaire to fill in and that he in twelve years of employment couldn't obtain a copy of a collective agreement until June 1975 when he asked the company for one, he was not specific enough to cast any doubt on the propriety of the procedures followed by the union.

10. On the basis of the above assessment the Board finds that the union did not engage in discriminatory conduct against Mr. Stuckey *en route* to allowing clause 48(b) and (c) to remain in the collective agreement. The remaining allegation against the union then is

that the mere existence of clause 48(b) and (c) in the collective agreement is, by virtue of its terms, discriminatory and in violation of section 60. Section 60 reads as follows:

“A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.”

11. Because the development of the duty of fair representation encompassed by section 60 has been traced by the Board on a number of occasions (see *Ford Motor Company of Canada Limited*, [1973] OLRB Rep. Oct. 519 at p. 526, *Walter Princesdomu*, [1975] OLRB Rep. May 444 at p. 460 and *Barber Coleman of Canada Ltd.* [1975] OLRB Rep. Oct., it is not necessary for the Board to repeat the process herein. Because specific reference will be made to the following aspect of the history of section 60, however, the Board notes that in each of the above mentioned reviews of the history of section 60, the Board has directly or indirectly attributed the source and foundation of section 60 to the United States Supreme Court decision of *Steele v. Louisville*, 323 U.S. 192 (1944) and *Vaca v. Sipes*, 386 U.S. 171 (1967) which will be addressed in greater detail below in the Board's discussion of the intended scope of the discriminatory branch of section 60. Additionally, it may be helpful to the Board's interpretation of section 60 to recall at the outset the mischief that section 60 was designed to meet. In *Ford Motor Company of Canada Limited* the Board made the following observation at pp. 524-526:

“In practical terms the relationship between members of the bargaining unit and the trade union is one of majority control. The relationship is not strictly one of contract between employee members of the union and the union, but rather the relationship is such that the system created more closely resembles the legislative process than a contractual relationship; see *Cox Rights under a Collective Agreement* 69 Harv. L. Rev. 601 (1956).

Section 60 of The Labour Relations Act is to ensure that individual rights are not abused by the majority of the bargaining unit; it is an attempt to achieve a balance between the individual interests and the majority interest by recognizing that the exclusive bargaining agent has a duty to consider all the separate interests in the preformance of its obligations. The duty has been described as the duty of fair representation. The emphasis is on fairness – it is a duty to act fairly in the interests of all members of the bargaining unit, minority factions, as well as majority factions, individual employees, as well as the collective group, members as well as non-members, craft employees as well as individual employees. It is not a duty which makes the union the guarantor or insurer for every situation in which an individual employee is aggrieved or adversely affected; rather, the statute attempts to have the union consider the position of all groups and to weigh the competing interests of minorities, individuals and other like groups in arriving at its decision. The difficulties that arise are in applying the concept of fairness and particularly where to draw the line between majority and minority rights.”

In response, thereby, to the high degree of control the union has over the individual union members, the legislature has imposed upon the union a duty of fair representation to protect the rights of minority groups and individuals from the tyranny of the majority.

12. A preliminary matter for the Board's determination in this case is whether the discrimination branch of section 60 is broad enough to prohibit a discriminatory clause in a collective agreement in a situation wherein the procedures adopted by the union in its negotiation process have been found to be proper and beyond dispute. In other words, is the intended scope of "discriminatory" in section 60 aimed beyond discriminatory conduct during the administration of the collective agreement or during the negotiating process to encompass as well the possibility of the existence of a discriminatory clause in a collective agreement reached by non-discriminatory means.

13. The complaints which have come before this Board alleging a violation of the discrimination arm of section 60 have generally involved allegations of active discriminatory conduct as opposed to a passive discriminatory result achieved through a non-discriminatory process. For example, in *Ford Motor Company, supra*, and *RCA Limited, Prescott, Ontario* [1974] OLRB Rep. Jan 60, the allegations concerned union conduct during the administration of the collective agreement; in *Diamond "Z" Association*, [1975] OLRB Rep. Oct. 791, the complaint centered on union misrepresentations which were alleged to have been made during the negotiating process.

14. The wording of section 60 as set out above is somewhat ambiguous. Section 60 declares that a union shall not "act in a manner that is ... discriminatory." At first glance this wording would seem to be addressed solely to active discriminatory conduct during the process of negotiation or the administration of a collective agreement. However, the plain meaning of the words may also be interpreted to mean that the union may not act in a manner that will result in discrimination. With this interpretation the clause would cover a discriminatory clause in a collective agreement that has been concluded through a non-discriminatory process. The Board is of the opinion that the second suggested interpretation of section 60 is the proper one. In other words, the Board's position is that the discrimination branch of section 60 is sufficiently broad to prohibit the existence of a discriminatory clause in a collective agreement which was concluded through a non-discrimination process. If the scope of section 60's discrimination arm were narrowed such that it encompassed only active discrimination during the administration of the collective agreement or the negotiation process, the mischief section 60 was designed to remove would still exist. As set out above, the intention of section 60 is to prevent a tyranny of the majority. Such a tyranny can result from, among other possibilities, the ability of the majority to "properly" vote any provision into a collective agreement. In support of its conclusion the Board further notes that the United States Supreme Court decision of *Steele v. Louisville* which fathered the concept of the union's duty of fair representation and has been stated by this Board to be the root of our section 60, involved a discriminatory clause achieved by a non-discriminatory process.

15. Having found that the mere existence of a clause in a collective agreement, such as article 48(b) or (c) of the agreement in question may properly be the subject of a section 60 complaint, the Board now turns its attention to whether or not the clause in question is in fact in violation of section 60. Although section 60 cases more commonly involve allegations of bad faith or arbitrary conduct than allegations of discrimination, the discrimination branch of section 60 has been considered by this Board on several occasions.

16. In *Princesdomu, supra*, the Board, *en route* to determining the scope of the prohibition against arbitrary conduct, discussed the nature of the discriminatory aspect of the duty of fair representation at pp. 461 – 462:

“Bad faith and discrimination are not being alleged in the facts at hand but their meaning is well worth a brief examination. The sequential use of the words may assist in elaborating the total meaning of the duty and at the very least the particular application of each word demonstrates why this case is difficult. The prohibition against bad faith and discrimination describe conduct in a subjective sense – that an employee ought not to be the victim of the ill-will or hostility of trade union officials or of a majority of the members of the trade union. (See Adell, *The Duty of Fair Representation – Effective Protection for Individual Rights in Collective Agreements?* (1974) 25 Indus. Rel. 602, 611.) Bad faith and discrimination constitute the outer limits of majoritarianism and official action, preventing a trade union from singling out certain individuals for unfair treatment. This aspect of the duty is particularly important in discouraging discrimination on the basis of race, creed, colour, sex, etc., preventing internal trade union politics from erupting into forms of interpersonal breakdowns within a trade union. It is basic to a system based upon an exclusive bargaining agent. But as important as this subjective ill-will aspect of the duty is and as difficult as it may be to apply in some circumstances the most vexing and difficult application of the duty is in giving meaning to the word ‘arbitrary’”

17. In *Ford Motor Company, supra*, the Board was asked to decide whether the union violated its section 60 duty by failing to pursue to arbitration the grievances of two discharged employees in the fact of having obtained discharge revocations for other employees dismissed for participation in the same event. After deciding that the union had not acted arbitrarily the Board at p. 532 turned its mind to whether or not the union decision was discriminatory:

“In turning next to the issue of discrimination we are mindful that the term discrimination was again derived from the American jurisprudence, and that it had its origin in a series of cases where members of minority groups were discriminated against by the union, see *E.G. Steele v. Louisville and N.R.R.* (9 LC para. 51, 188, 323 U.S. 192). The term discrimination in the context of section 60 is therefore associated with racial discrimination, but we do not propose to limit that term in interpreting section 60, but we are prepared to give it a broader interpretation which will prevent a union from distinguishing among members in the bargaining unit unless there are cogent reasons for so doing.”

In *Ford Motor Company, Supra*, the Board found that the union’s decision to drop the grievances of the complainants was not discriminatory because there were “cogent reasons” for distinguishing the grievors from the other discharged employees in that they alone were the leaders of the unlawful strike which led to the discharges.

18. Without defining the meaning of “discriminatory”, the Board in *RCA Limited, Prescott, Ontario, supra*, found that the union had violated its section 60 duty by acting in a

discriminatory manner by not notifying the complainant of the union meeting at which his grievance was to be discussed:

“The denial of access to the union meeting, if not arbitrary, was discriminatory, since Mr. Pap should have been allowed the same access to the union as were other members of the union. By its actions the union denied Mr. Pap that access and in these circumstances we therefore find that the union is in violation of section 60 of the Labour Relations Act.”

19. In *Diamond “Z” Association, supra*, the Board defined “discriminatory” in the following way:

“A trade union must not act ‘discriminatorily’ in that the benefits of representation are conferred on one member of the bargaining unit and denied another without reasonable excuse. Like situations ought to be treated in a like manner and without favour to any one individual.”

20. In reviewing the Board’s decisions interpreting the word “discriminatory” in section 60 the Board notes that the emphasis has varied. *Princesdomu* wherein the employee has become the victim of the hostility or ill will of union officials or the majority of the union. By defining “discriminatory” in these terms the emphasis has been placed on the motive for according certain individuals or groups of individuals singular treatment rather than the motive by indicating that the term “discriminatory” in section 60 is designed to “prevent a union from distinguishing members in the bargaining unit unless there are cogent reasons for doing so.” The other two cases referred to fall in line with the *Ford Motor Company* emphasis on result rather than the *Princesdomu* emphasis on motivation. In concluding that the union had discriminated against the complainant by not informing him of the union meeting at which his grievance would be discussed, the Board in *RCA* made no suggestion that the union had been motivated by ill will or hostility. The case turned on the finding by the Board that in omitting to send notification to the complainant the union accorded the complainant different treatment than the other employees without cogent reasons for doing so. Thus the end result of discrimination rather than the motivation for it was the decisive factor. In a similar vein, *Diamond “Z”* stated that the prohibition prevents the union from bestowing the benefits of its representation on one member of the bargaining unit to the exclusion of another without reasonable excuse. The implication of these cases thereby is that neither hostility nor ill will are necessary ingredients to a section 60 finding of discriminatory conduct and that even in the absence of hostility a discriminatory clause will be struck down if it is not supported by good reasons.

21. Resolving these two positions is particularly significant to this case because the respondent union was clearly not motivated by hostility in declining to negotiate the super-seniority clause out of the collective agreement. Thus if hostility is a prerequisite, a section 60 violation cannot be made out in this case. If, on the other hand, the Board finds that hostility is not a prerequisite to a section 60 violation, the Board must go on to decide whether clause 48(b) and (c) depict the type of discrimination which section 60 was intended to prevent.

22. Because counsel for the respondent union relied on American jurisprudence to support its position that hostility is a necessary ingredient to a section 60 violation based on

discrimination, and because the American jurisprudence surrounding the union's duty of fair representation is the very source of our section 60, the Board intends to examine the American law to assist its determination of whether the more proper emphasis is that placed on motivation for the discriminatory conduct such that hostility becomes a prerequisite to a violation of the discrimination branch of section 60, or that placed on the discrimination itself such that hostility does not become a prerequisite.

23. At first glance the United States jurisprudence supports the respondent's position that hostility is a necessary ingredient to a section 60 finding of discrimination. In *Simberlund v. Long Island Railroad Company*, 431 F. 2d 1219 (1970) the United States Court of Appeals, Second Circuit, stated at p. 1225 that bad faith was a prerequisite.

"In *Cunningham v. Erie R.R. Co.*, supra at 417 we emphasized that before a union can be charged with arbitrary or discriminatory action it must be shown that the union acted in bad faith ..."

In *Simberlund* the court found that the distinction made by the union alleged by the appellants to be discriminatory was a reasonable distinction. Thus in this case the only means by which this reasonable distinction could have been found to be discriminatory would have been for the court to find that it was motivated by hostility or ill will. In other words, the framework of *Simberlund* did not force the court to decide whether hostility would be required in all cases, i.e. in cases where the distinction made was not a reasonable one. It did not, in other words, present the issue in its ultimate form which would have been within the framework of an invidious distinction in the absence of hostility. It appears to this Board, therefore, that the blanket statement that "before a union can be charged with arbitrary or discriminatory action, it must be must be shown that the union acted in bad faith" was broader than necessary for the case at hand and to that extent is open to question.

24. In *Balowski v. General Motors Corporation*, 372 F 2d 820 (1967), a case upon which the court relied in *Simberlund*, the United States Court of Appeals, Sixth Circuit, similarly stated:

"It is now well settled that a 'bargaining representative of employees had the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without *hostile* discrimination against any employee or group of employees.'

...

The allegations of a complaint alleging the breach of a union's duty of fair representation must ... make a showing that the action or inaction of the statutory representative complained of was motivated by bad faith, for the gravamen of the rule is 'hostile discrimination' ... [c]onclusory words ... without a concomitant showing of lack of good faith [does] not set forth a claim."

25. In *Hardcastle v. Western Greyhound Lines*, 303 Fed. Rep. 2d 182, the United States Court of Appeals, Ninth Circuit, stated in unambiguous terms that a bad faith motive was a necessary ingredient to a finding that a union had violated its duty of fair representation. The court made the following statements at p. 184:

“In *Steele v. Louisville* ... the Supreme Court held that a union which purports to represent its entire membership must not engage in ‘hostile discrimination’ against some members, but must attempt to represent all fairly, impartially and in good faith.

...

Some of the general principles pertaining to collective bargaining and hostile discrimination have been stated by the Supreme Court, in *Ford Motor Co. v. Huffman*, *supra*, in the following manner:

...

‘Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.’

An essential element, then, necessary to raise a limitation upon a union’s discretion in bargaining with respect to seniority rights is a bad faith motive, an intent to hostilely discriminate against a portion of the union’s membership.”

26. In the opinion of this Board the emphasis on hostile discrimination set out in these cases is not warranted by the cases upon which they rely and results from a misinterpretation of the law.

27. The duty of fair representation was first established in the case of *Steele v. Louisville*, 323 U.S. 192 (1944). The court held in that case that by including provisions in the collective agreement which were aimed at ultimately excluding all black firemen from the service the union violated its duty of fair representation. The United States Supreme Court described that duty in two different parts of the judgment – one of which uses the term “hostile discrimination” (p. 233) and one of which doesn’t (p. 232):

“While the statute does not deny to such a bargaining labour organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without *hostile discrimination*, fairly impartially, and in good faith.” (Emphasis added).

...
 “Here the discriminations based on race alone are obviously *irrelevant and invidious*. Congress plainly did not undertake to authorize the bargaining representative to make such *discriminations*.” (Emphasis added.)

In this case the United States Supreme Court made a finding of discrimination with no evidence whatsoever that the union was motivated by hostility or bad faith. Indeed it appeared that the union was following an established practice of several other railways. After reviewing the case it appears to this Board that in discussing the merits of the case the Court concentrated on the invidiousness of the discrimination itself, i.e. on the result, rather than on any hostility prompting the discrimination, i.e. on the motivation. This Board suggests then that because of the total absence of any finding of hostility in this case the isolated use of the word “hostile” in *Steele* is not reflective of a position by the United States Supreme Court that hostility is a prerequisite to a breach of the discrimination arm of the union’s duty of fair representation. The Board suggests instead that given its context within the decision, “hostile” is meant to reflect the court’s refusal to tolerate invidious discrimination. Indeed, because of the total absence of a finding of hostile motivation in this case, if hostility were a prerequisite the court could not have struck down the clause which resulted in an invidious distinction. Based on the above reasoning then, the Board finds that in fastening on the *Steele* phrase of “hostile discrimination” to support a finding that hostility is a necessary ingredient to a violation of the union’s duty of fair representation, the courts in *Hardcastle* (see p. 184) and *Balowski* (see p. 833) have misinterpreted the *Steele* decision by giving a significance to the word “hostile,” which is unsupported by its context within that decision.

28. Another United States Supreme Court decision, *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953) was also referred to by both *Hardcastle* and *Balowski* to validate the conclusion that hostility is a necessary ingredient to a finding of discrimination. After reviewing the case the Board finds that the oft quoted passage from *Ford* (as quoted above in the Board’s discussion of *Hardcastle*, para. 24) does not support such a conclusion. The passage states that distinctions in a collective agreement which are concluded in good faith are not necessarily discriminatory. This statement implies that the same difference may become discriminatory in a situation where the union is motivated by hostility. This statement, however, does not preclude the possibility that a good faith distinction may also be discriminatory if it is based on a distinction without justification. In other words it does not either state or imply that hostility is a prerequisite to a violation of the union’s duty of fair representation based on discrimination.

29. As noted above in paragraph 11 of this decision, the United States Supreme Court decision of *Vaca v. Sipes* has, in addition to *Steele*, been recognized by this Board as the wellspring of our section 60 duty of fair representation. It is of particular significance to an interpretation of section 60, therefore, to note that in *Vaca* at p. 910 the duty is described such that matters of hostility are clearly separated from matters of discrimination:

“Under this doctrine, the exclusive agent’s statutory authority to represent all members of a designated unit includes a statutory obligation to serve the

interests of all members without hostility or discrimination towards any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.”

30. In response to our review of the Board’s jurisprudence interpreting the word “discriminatory” in section 60 as well as some American jurisprudence interpreting the discriminatory aspect of their duty, we note the following factors in support of our conclusion that hostility or subjective ill will are not prerequisites to a violation of the discrimination arm of the section 60 duty of fair representation: *firstly*, this interpretation more completely eliminates the mischief section 60 was designed to meet, *secondly*, while hostility as a prerequisite was implied in *Princesdomu* the discussion was *dictum* and in the Board’s eye was not intended to be exhaustive. *Thirdly*, the United States Supreme Court decisions establishing the duty of fair representation, *Steele*, *Huffman*, and *Vaca*, both on their facts and in their language, indicate either directly or indirectly that bad faith is not a prerequisite to a finding of discrimination; *fourthly*, because the United States Court of Appeals cases which assert that hostility is a necessary ingredient to a violation of the duty of fair representation rely directly on these United States Supreme Court cases for their position, the Board is of the view that they result from misinterpretation of the law which started with a misinterpretation of the phrase “hostile discrimination” in the *Steele* decision. Accordingly, the Board accords them no persuasive value.

31. To summarize the position of the Board, therefore, we suggest that “discriminatory” in section 60 is designed to prevent distinctions in treatment accorded individual employees or groups of employees which are made without the support of cogent labour relations reasons. The focus of concern is on the distinction itself rather than on the motive for the distinction. Thus a distinction made without malice may be discriminatory if it lacks the underpinning of reasonableness defined from a labour relations point of view. By the same token a seemingly reasonable distinction may become discriminatory if it is motivated by hostility.

32. We move now to a determination of whether the distinctions rooted in section 48(b) and (c) of the collective agreement are “discriminatory” under section 60 of the Act. i.e. are the lay-off privileges accorded the union officials supported by cogent labour relations reasons or are they arbitrary and invidious.

33. To explain the history of the clause in issue, the respondent union introduced prior collective agreements between Locals 112 and 1967, on the one hand, and Douglas Aircraft as well as its predecessor, De Havilland of Canada Ltd., on the other hand. From these collective agreements coupled with the uncontradicted testimony of Mr. Sheffe and Mr. Johnston it appears to the Board that a super-seniority clause appeared in De Havilland’s first collective agreement with Local 112 in 1949 and has remained virtually unchanged to the present day.

34. Mr. Sheffe stated that the purpose of a super-seniority clause is to provide experienced and consistent union representation for members of the bargaining unit throughout a period of lay-off by granting Plant Chairmen, members of the Local Executive Board, Zone Committeemen and Shop Stewards elevated seniority. Mr. Johnston stated that the clause is essential for effective labour relations because without it perpetual training of new union representatives would replace a guaranteed continuity of experienced representation. Mr.

Sheffe indicated that a super-seniority clause is not unique and stated that in each of the fifty contracts he has negotiated as an international representative the super-seniority clause has been included.

35. In *Aeronautical Industrial District Lodge 727 v. Campbell*, 337 U.S. 521 (1949) the Supreme Court of the United States considered a super-seniority clause for Union Chairmen. At pp. 1290-1291 it made the following observation in concluding that such a clause is not discriminatory:

"A labour agreement is a code for the government of an industrial enterprise and, like all government, ultimately depends for its effectiveness on the quality of enforcement of its code. Because a labour agreement assumes the proper adjustment of grievances at their source, the union chairmen play a very important role in the whole process of collective bargaining. Therefore it is deemed highly desirable that union chairmen have the authority and skill which are derived from continuity in office. A provision for the retention of union chairmen beyond the routine requirements of seniority is not at all uncommon and surely ought not to be deemed arbitrary or discriminatory."

The Board accepts the validity of the above reasoning and finds that a distinction between union officials and non-union officials based on this ground is not discriminatory under section 60 because it is justified by a good labour relations purpose. While the clause in the case at hand covers more than the union Chairman and includes the executive committee members, the zone committeemen and shop stewards, the Board is of the view that these additional inclusions were derived from the same justification, i.e. that it is in the best interest of all employees that their labour officials be free from ordinary lay-offs.

36. The Board therefore finds that articles 48(b) and (c) comprise an acceptable form of discrimination and are not thereby in violation of the discrimination branch of the union's duty of fair representation. Since the Board has dismissed the claim against the union, the claim against the employer cannot be maintained for the reasons given at the outset of the decision and is accordingly dismissed.

1237-76-U Consolidated Bathurst Packaging Limited, (Applicant), v. International Woodworkers of America and Local 2-337 and William Barton, et al, (Respondents).

Strike – S82 – Declaration – Whether Board will exercise discretion to grant declaration after strike is over – Effect of recent amendments expanding remedial authority – Effect of work stoppage occurring on day of national protest and as part of aftermath.

BEFORE: Donald D. Carter, Chairman, and Board Members J.D. Bell and E. Boyer.

APPEARANCES: Michael Gordon and Ronald Gruber for the applicant; J. Sack, Dan Chaisson; Mary D. Clarke and G.D. Clarke for themselves.

DECISION OF THE BOARD: *December 24, 1976.*

1. This is an application brought under section 82 of the *Labour Relations Act*. The applicant seeks a declaration that certain of its employees have engaged in unlawful strikes and an order directing these employees to refrain from engaging in any further unlawful strikes.

2. The two work stoppages that gave rise to this application occurred at the applicant's St. Thomas plant on October 14 and October 15, 1976. The first work stoppage, a response to the call of the Canadian Labour Congress for a "National Day of Protest", resulted in a complete shutdown of the plant. The second work stoppage was apparently a protest against a disciplinary suspension imposed upon two members of the union executive, Warren and Lee, for their participation in the work stoppage of the previous day. This work stoppage was brought to an end after only one shift, a factor being the efforts of Warren and Lee to persuade their fellow employees to return to work. The applicant has disciplined those employees involved in the two work stoppages, and the respondent union has responded by filing grievances in respect of those disciplinary measures. No further work stoppages or threats of further work stoppages occurred after October 15th.

3. A preliminary issue must be dealt with before determining the legality of the two work stoppages. The strike declaration, and direction, are discretionary remedies, and do not issue as of right. In previous cases, the Board has usually exercised its discretion by refusing to grant a declaration where a work stoppage has been brought to an end by the time the application for the declaration is brought on for a hearing. The rationale for this approach has been set out fully in the *Acoustical Association* case, [1975] OLRB Rep. July 539. In that decision, the Board indicated, however, that the general approach of not granting the declaration after unlawful strike activity has been discontinued would not be followed in three situations – where there is evidence before the Board of a past pattern of unlawful strike activity, where there is evidence before the Board that unlawful strike activity is likely to recur, and where there is evidence that the unlawful strike upon which the application is based has implications that extend beyond the immediate parties to the application. These three exceptions recognize that the advantages of not granting a declaration may be outweighed, in some situations, by the need for an authoritative determination on the legality of the conduct in question. The first two exceptions deal with situations where it is apparent that the parties have not been able to settle the dispute between themselves, giving rise to a need for some form of third party intervention. The last exception operates on a different plane, its justification being the need for an authoritative determination in order to advise other persons, as well as the parties to the applications, as to the legality of certain kinds of conduct. See *Norfolk Hospital Association*, [1974] OLRB Rep. Sept. 581. Although the need for a general advisory determination by the Board occurs only infrequently, it nevertheless creates a clear exception to the Board's general approach of not granting a declaration after an illegal work stoppage is spent.

4. This general approach is one that was formulated by the Board prior to the amendment of the *Labour Relations Act* in 1975. One effect of this amendment of the Act, however, was a substantial alteration in the wording of section 82 by the incorporation of much of the language found in section 123, the section giving the Board remedial jurisdiction to deal with illegal strikes in the construction industry. The result was an expansion of the Board's remedial jurisdiction under section 82 so as to include the power to issue direc-

tions in respect of any unlawful strike or threatened unlawful strike. An important question is whether the amendment of section 82 requires the Board to alter its general approach to discontinued strikes by making the remedies under section 82 more available to an applicant.

5. There are no decisions of the Board since the amendments that would indicate any alteration in approach. In fact, the Board's decision in *Acme Building and Construction Ltd.*, [1975] OLRB Rep. Nov. 870, although not raising the question, at least suggests that the amendments do not dictate an approach that would provide an applicant with greater access to the remedies under section 82 where strike action has been discontinued. Indeed, the thrust of section 82 is in quite a different direction, this section having been extended to deal with anticipated strike action. The advantage of the extended remedy is that it is anticipatory, serving to prevent damage from illegal strikes. Given that there now exists a greater opportunity to seek remedial relief prior to the occurrence of an illegal strike, there appears to be no justification for widening access to the Board's remedial powers after the strike action has been discontinued. Applicants should be encouraged to seek remedial relief prior to the occurrence of an illegal strike, rather than after "the horse has bolted".

6. Our conclusion is that the applicant must establish facts that fall within at least one of the three exceptions mentioned above in order for the Board to exercise its discretion by granting one, or both, of the remedies being sought. The evidence clearly does not establish either one of the first two exceptions. The two work stoppages that occurred on consecutive days do not establish a past pattern of unlawful strike activity. It was clear from the evidence that the first work stoppage was a response to the call for a National Day of Protest, while the second work stoppage was part of the aftermath of the first work stoppage. We have no reason to regard the two work stoppages as other than isolated events, the product of the labour movement's protest against the *Anti-Inflation Act*. There does not appear to be any continuing conflict between the applicant and the respondent union so as to suggest any kind of pattern of unlawful strike activity. The evidence of a likelihood of any future unlawful strike activity is even more tenuous. No strike threats have been made since October 15th, and the respondent union, quite properly, has resorted to grievance arbitration in order to deal with unresolved problems relating to the two work stoppages. We, therefore, conclude that the applicant has not established that there is any likelihood of future unlawful strike activity.

7. There remains the question of whether there is any need for a general advisory determination as to the legality of the conduct in question, and more especially the work stoppage that occurred on October 14th. In our view, this need has been satisfied already by the declaration issued by the Board in *Domglas Ltd.*, [1976] OLRB Rep. Oct. In that decision, the Board canvassed at length the issue of the legality of a work stoppage that was in response to the call for a National Day of Protest, and issued a declaration having a general advisory effect. We see no useful purpose to be served by a simple reiteration of the determination made in that case.

8. Accordingly, this application is dismissed.

1526-75-JD Donaldson-Barron Limited, Opec Acoustics & Drywall Limited, C. Strauss (1973) Limited, Northdown Drywall & Acoustics Limited and Cesaroni Brothers Limited, (Complainants), v. Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 1133, 1747, 1963, 3227, 3233 of the United Brotherhood of Carpenters and Joiners of America, The General Contractors' Section of the Toronto Construction Association, M.A. Butt Construction Limited, E.S. Martin Construction (Ontario) Ltd., C. A. Smith Contracting Limited, Sheraton Construction Limited, Ellis-Don Limited and Eastern Construction Company Limited, (Respondents).

Jurisdictional Dispute – S81 – (The District Council had filed grievances against the Association alleging that Association members had sub-contracted work to another union in violation of the agreement) – Whether the Board has jurisdiction – Whether there is a conflict of assignment as envisaged by S81(1).

BEFORE: R. A. Furness, Vice-Chariman, and Board Members H. J. F. Ade and E. Boyer.

APPEARANCES: *D. K. Laidlaw, Q.C., and Alan Lenczner appearing for the complainants; Harold Caley and Chris G. Paliare appearing for the Carpenters' District Council of Toronto and Vicinity; B. W. Binning and W. McNaughton appearing for The General Contractors' Section of the Toronto Construction Association, M. A. Butt Construction Limited, E. S. Martin Construction (Ontario) Ltd., C. A. Smith Contracting Limited, Ellis-Don Limited and Eastern Construction Company Limited; J. C. Murray and B. W. Binning appearing for Sheraton Construction Limited; R. C. Filion and D. I. Wakely appearing for the Interior Systems Contractors Association; Joseph Liberman appearing for the Acoustical Association of Ontario; Alan Minsky and M. Gotlieb appearing for Wood, Wire and Metal Lathers' International Union, Local 562, and B. Chercover and N. LeBlanc appearing for The Ontario Acoustical and Drywall District Council of the United Brotherhood of Carpenters and Joiners of America.*

DECISION OF THE BOARD: December 20, 1976.

1. In this complaint concerning work assignment, the complainants have requested that the Board issue a direction under section 81 of The Labour Relations Act with respect to certain work which is in dispute. The complainants have briefly described the work which is in dispute as:

- (a) The installation of "acoustical ceiling systems" (as per trade usage);
- (b) The installation and erection of demountable partition systems with related components;
- (c) The setting of door frames in drywall partition systems including demountable partition systems;

And all work related thereto at the various work sites hereinafter described.

2. In a decision dated March 3, 1976, the Board held that for reasons to be given in writing it had jurisdiction to entertain this complaint. The Board now gives its reasons.

3. The Carpenters' District Council of Toronto & Vicinity (the "District Council") and the Ontario Acoustical and Drywall District Council of the United Brotherhood of Carpenters and Joiners of America (the "Drywall District Council") adopted the position that the Board has no jurisdiction to entertain this complaint. In support of this position the District Council alleged that the complainants did not have any status to initiate this complaint. In addition, the District Council and the Drywall District Council alleged that the District Council is not requiring the complainants to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another trade, craft or class.

4. Various counsel at the hearing raised questions concerning the status of certain persons to be present at the hearing. After considering the representations before it, the Board ruled that it would hear from all counsel regarding any agreed facts and would if necessary hear evidence from the parties with respect to the jurisdiction of the Board to entertain this complaint. The Board announced that at the conclusion of the evidence it would hear argument with respect to the evidence and any agreed facts. The Board ruled that in permitting all counsel to participate in the question of its jurisdiction, the Board was not to be taken as finding that all persons who appeared had status to participate in this proceeding on the merits in the event that the Board determined that it did have jurisdiction to entertain this complaint. The Board further ruled that in the event it determined that the Board did have jurisdiction, the Board would then entertain evidence and representations concerning any objections to the status of any person to participate in this proceeding on the merits.

5. The parties agreed to the following facts:

1. The contracts alleged in the complaint, that is to say, between the general contractor and the respective sub-contractors are admitted to be contracts in effect and which cover in part the disputed work.
2. Each of the sub-contractors referred to in the complaint had a valid and subsisting collective agreement with the Wood, Wire and Metal Lathers' International Union, Local 562.
3. The respective sub-contractors did assign the disputed work to members of the Wood, Wire and Metal Lathers' International Union, Local 562.
4. The carpenters by the Toronto and Vicinity District Council filed a grievance with regard to each contract in the complaint requesting, *inter alia*, the assignment to carpenters of the disputed work.
5. The general contractors in each respective case requested the sub-contractor to assign the disputed work to carpenters. Two examples are filed with the Board:

- (i) is a grievance dated September 23, 1975, filed by the Toronto and Vicinity District Council of the Carpenters with the General Contractors Section of the Toronto Construction Association with respect to Sheraton Construction Limited regarding the Bell Telephone job and with it a registered letter of October 8, 1975, from Sheraton Construction Limited to Northdown Drywall & Acoustics Limited.
- (ii) is a grievance by the Toronto and Vicinity District Council of the Carpenters dated November 19, 1975, to C. A. Smith Contracting Limited the general contractor. This deals with a project in Caledon East. On November 28, 1975, C. A. Smith Contracting Limited wrote to C. Strauss (1973) Limited.

6. The various documents which are referred to in these agreed facts were filed with the Board. The collective agreement between The General Contractors' Section of The Toronto Construction Association (the "Association") and the District Council became effective on August 5, 1975, to and including October 31, 1977. The collective agreement between The Interior Systems Contractors Association (ISCA) and The Wood, Wire and Metal Lathers' International Union, Local 562, ("Local 562") became effective on May 4, 1974, and remains in force until April 30, 1977. The District Council and Local 562 lay claim to the work in dispute. Such claims are set forth in their respective collective agreements. The general contractors are bound by the collective agreement between the Association and the District Council. The complainants are bound by the collective agreement between ISCA and Local 562.

7. Articles 2.02 and 2.06 of the collective agreement between the Association and the District Council provide:

"2.02 The Employer agrees to continue to hire and employ Employees who are members in good standing of the Union to perform work traditionally done on the job site by Carpenters within the jurisdiction of the United Brotherhood of Carpenters and Joiners of America including, but not limited to:

- (a) Job site fabrication and installation of forms to receive concrete.
- (b) Installation of prefabricated acoustical ceiling systems.
- (c) The installation and erection of demountable partition systems composed of various materials.
- (d) The setting of door frames.
- (e) The hanging of doors including necessary hardware.
- (f) The installation of wood strapping.
- (g) The installation of wood furring and wood blocking.
- (h) The installation of millwork items including store fixtures.

- (i) The installation of wall panels such as plywoods, plastic laminates, cork boards and chalk boards.
- (j) The on site erection of temporary wood hoardings, safety barriers, dust barriers, site offices and sheds.

2.06 The employer agrees to engage only sub-contractors who are under agreement with the Union to perform work traditionally done on the job site by Carpenters within the jurisdiction of the United Brotherhood of Carpenters and Joiners of America including, but not limited to:

- (a) Job site fabrication and installation of forms to receive concrete.
- (b) Installation of prefabricated acoustical ceiling systems.
- (c) The installation and erection of demountable partition systems composed of various materials.
- (d) The setting of door frames.
- (e) The hanging of doors including necessary hardware.
- (f) The installation of wood strapping.
- (g) The installation of wood furring and wood blocking.
- (h) The installation of millwork items including store fixtures.
- (i) The installation of wall panels such as plywoods, plastic laminates, cork boards and chalk boards.
- (j) The on site erection of temporary wood hoardings, safety barriers, dust barriers, site offices and sheds.

8. In their letters dated September 23 and November 19, 1975, the District Council allege violations of article 2 of their collective agreement with the Association. These letters allege that the general contractors in question have sub-contracted certain work which falls within the jurisdiction of the United Brotherhood of Carpenters and Joiners of America. The letter dated November 19, 1975, also states that the general contractor has sub-contracted work to a company which does not have an agreement with the District Council. Both letters request relief in the form of compensation to the District Council and/or its members for the wrongful performance of work. The letter dated November 19, 1975, indicates that the wrongful performance of work has been by persons who are not members of the United Brotherhood of Carpenters and Joiners of America. The letter dated September 23, 1975, indicates that the wrongful performance of work has been by non-carpenters. Both letters request that the work in question be assigned exclusively to carpenters.

9. In a letter dated October 8, 1975, Sheraton Construction Limited requested Northdown Drywall & Acoustics Limited to employ carpenters to install acoustic tile ceil-

ings "as per the current collective agreement". In a letter dated November 28, 1975, C. A. Smith Contracting Limited advised C. Strauss (1973) Limited that "we consider it essential that you use carpenters to install the acoustic grid ceilings. As you are aware, Article 7, paragraphs 3 and 6 bear on this matter, and we feel it is to the mutual advantage of both our companies to ensure that the work is performed by the workmen properly authorized by our union agreements in order to prevent unnecessary inconvenience and expense to either of our firms." The letter goes on to point out that in the event that an arbitration board makes an award against C. A. Smith Contracting Limited due to the fact that C. Strauss (1973) Limited has used other than carpenters to perform the work in question, the former would have no alternative but to claim against the latter for the amount of the award. The letter concludes by stating "I feel it is most important that you be aware of this potential problem and take every step to ensure that the work is done by carpenters as required by the existing agreements." The sub-contracts between the general contractors and the complainants were not placed in evidence by the Board and no explanation was offered to the Board concerning the reference to "Article 7, paragraphs 3 and 6".

10. The District Council has filed grievances against the general contractors under the collective agreement between the Association and the District Council. Having regard to the foregoing facts, may it be said that the Board has jurisdiction to entertain this complaint? In our opinion, this question must be answered in the affirmative.

11. Section 81(1) of The Labour Relations Act states:

"81(1). The Board may inquire into a complaint that a trade union or council of trade unions, or an officer, official or agent of a trade union or council of trade unions, was or is requiring an employer or an employers' organization to assign particular work to person in a particular trade union or in a particular trade, craft or class rather than to persons in another trade union or in another trade, craft or class, or that an employer was or is assigning work to persons in a particular trade union rather than to persons in another trade union, it shall direct what action, if any, the employer, the employers' organization, the trade union or the council of trade union or any officer, official or agent of any of them or any person shall do or refrain from doing with respect to the assignment of work."

12. By virtue of section 81(1) the Board may inquire into a complaint that a trade union or council of trade unions, or an officer, official or agent of a trade union or council of trade unions, was or is requiring an employer or an employers' organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another trade union or in another trade, craft or class. The letters dated September 23 and November 19, 1975, request that the work in question "be assigned exclusively to carpenters". There is nothing before the Board to indicate that the District Council directly communicated such a request to any of the complainants.

13. At this point it is necessary to answer two questions. Firstly, in the context of a grievance under a collective agreement, what is the significance of a request of the general contractors that the work in question "be assigned exclusively to carpenters"? Secondly, were the general contractors in their letters dated October 8 and November 28, 1975, acting as agents of the District Council?

14. Since the sub-contracts between the general contractors and the complainant are not in evidence before the Board, there is no indication of whether the complainants were or were not obliged to employ members of any particular trade union to perform the work in question. Pursuant to article 2.02 of the collective agreement between the Association and the District Council, the general contractors agree to continue to hire and employ employees who are members in good standing of the District Council to perform work traditionally done on the job site by carpenters within the jurisdiction of the United Brotherhood of Carpenters and Joiners of America including, but not limited to, certain enumerated classes of work. Pursuant to article 2.06 the general contractors agree to engage only sub-contractors who are under agreement with the District Council to perform work traditionally done on the job site by the carpenters within the jurisdiction of the United Brotherhood of Carpenters and Joiners of America including, but not limited to, the same enumerated classes of work which are referred to in article 2.02.

15. The District Council became aware that the complainants were performing the work in question on sub-contracts from the general contractors and that non-carpenters or persons who were not members of the United Brotherhood of Carpenters and Joiners of America were doing this work. Under their collective agreement with the Association, the District Council was entitled pursuant to articles 2.02 and 2.06 to request the general contractors (i) to continue to hire and employ employees who are members in good standing of the District Council to perform work in question, and/or (ii) to engage only sub-contractors who are under agreement with the District Council to perform the work in question. In the circumstances of this complaint it was not open to the general contractors to assign the work in question exclusively to carpenters because the persons who were performing the work in question were employees of the sub-contractors. In our view, the letters dated September 23 and November 19, 1975, may only be interpreted as a request to the general contractors to have the sub-contractors assign the work exclusively to carpenters. In our opinion this is what happened. The Board finds that the District Council through the medium of the general contractors required the complainants to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another trade union or in another trade, craft or class within the meaning of section 81(1) of The Labour Relations Act.

16. In the case of *Regina v. Ontario Labour Relations Board, ex parte International Association of Bridge, Structural & Ornamental Iron Workers, Local 736* [1969] 1 O.R. 405, Fraser, J. considered the meaning of the word "agent" in section 66(1) [the predecessor of section 81(1)] of The Labour Relations Act. At page 411 of that case, Fraser, J. stated:

"Having regard to its context and the purpose of the statute in which it is found I am satisfied that "agent" in s. 66 is used in its broad general sense rather than in a narrow specialized sense such as is found in the law of contracts. To hold that a union could avoid the effect of s. 66 by interposing some third person or agency to do the requiring would give s. 66 an unduly restrictive meaning and frustrate the plain purpose of the enactment."

17. The Board finds that the general contractors were the agents of the District Council within the meaning of section 81(1) of The Labour Relations Act. The general contractors as agent of the District Council requested and required the sub-contractors to assign

particular work to persons in a particular trade union or in another trade, craft or class within the meaning of section 81(1).

18. Counsel referred to a series of earlier decision of the Board by differently constituted panels of the Board. This panel of the Board was, in effect, invited to agree or disagree with the philosophy, language and results of those earlier decisions. The decisions which were referred to include the *Abe Dick Masonry Limited* case, [1972] OLRB REP. January, p. 74; the *Ellis Don Limited* case, [1972] OLRB REP. March, p. 215; the *Northdown Drywall & Construction Limited* case, [1972] OLRB REP. June, p. 666 and the *C.A. Pitts Engineering Construction Limited* case, [1973] OLRB REP. February, p. 85.

19. In determining that it has jurisdiction to entertain this complaint, the Board has not found it necessary to pass upon the philosophy which was expressed in the cases which were referred to in the preceding paragraph. The arguments which were presented by counsel raise fundamental questions concerning the interpretation to be given to section 81(1) of The Labour Relations Act. In our view a definitive interpretation of section 81(1) must await an appropriate complaint where all relevant facts are adduced before the Board. The place of section 81(1) in the complex interaction of arbitration, jurisdictional clauses in collective agreements, contracts between general contractors and sub-contractors, jurisdictional disputes, the appropriate forum and the interest of all interested parties in being heard requires the fullest consideration of each of these elements. The previous decisions of the Board do not always indicate the facts upon which the decision is based. For example, the *C. A. Pitts Engineering Construction Limited* case, *supra*, merely records that:

“Having considered the submissions of the parties the Board is of the opinion that the preliminary facts outlined by the parties would indicate that this is a jurisdictional dispute or work assignment situation that clearly falls within the framework of section 81 of The Labour Relations Act, and accordingly we find that we have jurisdiction to entertain the merits of this case.”

In the instant complaint, for example, the Board was not informed of the terms of the contracts between the general contractors and the complainant.

20. The Registrar is directed to list this complaint for continuation of hearing on the merits. Counsel indicated at the hearing that they might be able to agree on the question of the status of certain persons to be present at the hearing. In the event that counsel have been unable to agree, the Board will initially entertain representations on the question of status.

1224-76-R United Steelworkers of America, (Applicant) v. Canadian Wire Brush Company Division of Sweepco Industries Inc., (Respondent).

Certification – Bar – S5(2) and S53 – Whether the Board will impose a bar to application – Effect of 12 year old certificate to another trade union – Effect of two previous applications in same calendar year – Effect of a previous dismissal when union withdrew in the face of a Board investigation regarding irregularities in the membership evidence.

BEFORE: M. G. Picher, Vice-Chairman, and Board Members J. E. C. Robinson, Q.C. and H. Simon.

APPEARANCES: *A. E. Munro and P. V. Grasso for the applicant; W. G. Phelps and H. Maltarp for the respondent.*

DECISION OF M. G. PICHER, VICE-CHAIRMAN, AND BOARD MEMBER H. SIMON, December 6, 1976:

2. This is an application for certification.

4. The Board further finds that all employees of the respondent at Barrie, save and except foremen, persons above the rank of foreman, office and sales staff, persons employed for not more than 24 hours per week, and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. Counsel for the respondent requested that the Board exercise its discretion to order a representation vote among the employees in the bargaining unit notwithstanding that the documentary evidence tendered by the applicant would indicate membership strength in excess of fifty-five per cent of the affected employees.

6. In support of his request he cited three reasons. Firstly, he argues that this being the third application within this calendar year made on behalf of the applicant with respect to the same employees there is a danger of confusion in the minds of the employees at the time they signed applications for membership in the applicant union. Secondly, he submits that the Board's dismissal of a recent prior application by the union in the face of an allegation of fraud by the applicant sufficiently weakens the weight of the membership evidence in the instant application to justify a vote. Thirdly, he draws the Board's attention to an outstanding certificate issued by the Board to the Christian Labour Association of Canada in respect of the same employees. That certificate is dated August 26, 1964.

7. Dealing firstly with the last point, the Board finds that that twelve year old certificate is of little support to the respondent's position, if it is indeed at all relevant. The "certification bar" to subsequent applications provided for in sections 5(2) and 53 of The Labour Relations Act provides the protection of a minimal period of time in which a union certified as exclusive bargaining agent may endeavour, freely and undisturbed by the efforts of rival unions, to establish a collective bargaining relationship with an employer. A second protection exists when, upon a timely application by a rival union for a certificate to displace existing bargaining rights, the Board orders a representation vote. It is the Board's practice to then afford the incumbent union the minimal protection of inclusion on the ballot.

8. In the instant application it is common ground that the Christian Labour Association of Canada has never concluded a collective agreement with the respondent. Moreover, the Board has received a letter from that union dated November 5, 1976 whereby it disclaims any interest in this application. In circumstances such as these, the reasons for deferring to the holder of a prior certificate clearly do not apply. The existence of that certificate, even if it is remotely relevant, lends little or no weight to the respondent's request for a representation vote.

9. Secondly, the Board is not persuaded that the mere fact that there have been three applications by the same union in respect of the same employees in this calendar year is itself sufficient reason to order a representation vote. The facts of the prior applications are as follows:

- 1) On February 9, 1976, pursuant to an order of this Board in an application for certification brought by the applicant, a representation vote was taken among the respondent's employees. The employees then rejected the union. That application was therefore dismissed and, following the Board's normal practice, the applicant was made subject to a six-month bar prior to any renewed application.
- 2) Upon expiry of the bar the applicant again applied for certification (Board File No. 0972-76-R). In that case the applicant appeared to have sufficient documentary membership evidence for certification without the taking of a representation vote. Subsequent to the hearing of that application the Board's routine check of the membership evidence revealed an irregularity in one of the membership documents filed in support of the application. Specifically, the signature of an employee upon one membership card did not appear to correspond to the specimen signature provided by the employer. As it customarily does in such cases, the Board appointed a Labour Relations Officer to investigate. His findings, which correspond to the facts that are common ground between the parties in the instant application, were that the employee in question intended to join the union and in fact paid the initiation fee and printed his name on the reverse side of the application form, but neglected to place his signature in the appropriate space. The collector who gathered his card and application fee was not a union officer, but an employee in the bargaining unit. She signed the applicant's name in the space provided for his signature.

The Board ordered a second hearing to inquire into the above circumstances and into the validity of the applicant's membership evidence generally. Prior to the date of that hearing the applicant, by telegram, sought leave to withdraw its application. Counsel for the applicant states that it then did so in good faith and with the newly acquired knowledge that its membership evidence was of a quality that did not meet with previously stated Board policy. Following its normal practice in such cases, the Board denied leave to withdraw, and, on October 22, 1976 dismissed the application.

- 3) After seeking leave to withdraw the applicant filed the instant application. In support of its renewed application it filed fresh membership evidence with a view, as stated by counsel for the applicant, to avoid any taint or weakness that might attach to the membership evidence previously submitted.

10. Dealing with the fact that there have been three successive applications, there is no evidence before us to suggest, much less to prove, that there is any confusion in the minds of the respondent's employees as to the meaning of paying initiation fees and signing membership documents in support of the instant application. The Board appreciates that it would be difficult for an employer to solicit such evidence without risking the appearance of interfering with the organization of a trade union, contrary to section 56 of the Act. However, with the greatest respect to the respondent, we are not prepared to give effect to the suggestion of employee confusion on the basis of mere speculation. To do so would import into the Board's processes an element of paternalism that is out of keeping with the scheme and intent of The Labour Relations Act.

11. There is no suggestion that the employees did not receive adequate notice of the hearing in the instant application. Notice was given and no objectors have presented themselves to oppose the application or to seek any clarification. The daily practice of this Board has taught us that objecting employees do not hesitate to do so. Confronted with a suggestion similar to the respondent's in the recent case of *David Barry Company Limited* (Board File No. 0802-76-U, Sept. 28, 1976) the Board stated:

"This Board often hears from employers of their concern that full force and effect be given to the free wishes of their employees. However well-motivated those concerns may be, The Labour Relations Act, and the very existence of this Board, remain grounded in a fundamental trust that employees are best able to represent their own interest, and that they will do so following their own wishes".

In view of the material before us we can give no weight to the suggestion that the employees who have signified in writing that they wish to be represented by the applicant were confused when they did so.

12. Nor are we prepared to attach any weight to the fact that the employees rejected the applicant in a representation vote taken some nine months ago. After the passing of the period of the six month bar the employees have indicated through the documentary evidence submitted that they now feel otherwise. We see no reason to doubt the expression of their present choice. This Board has never regarded certain unions as lesser applicants than others, nor are we aware of any cases, absent fraud, where this Board has cited a previous unsuccessful application as the basis for requiring the additional evidence of a representation vote prior to issuing a certificate. To accede to the respondent's suggestion would be to reduce a previously unsuccessful applicant to the status of a second class applicant in a renewed application by subjecting that union to a presumption of doubt respecting its documentary evidence. There is no basis for such a presumption in either the Act or the policies and practice of this Board.

13. We turn lastly to the submission of the respondent that the dismissal of the second application under the cloud of allegations of fraud upon the Board should lead us to seek the confirmatory evidence of a representation vote in this application. Counsel for the respondent cited *Hydro Electric Commission of Hamilton* 58 CLLC 18,120, a decision of this Board in which a representation vote was ordered where the dismissal of an earlier application in the face of two "non-pay" allegations was seen, notwithstanding the submitting of fresh membership evidence on the second application, to cast a cloud on the documentary evidence in the second application.

The circumstances of the "non-pay" charges are not described in the reported decision and no indication is given whether the misrepresentation was deliberate or inadvertent, or whether it was committed by a union official or an employee in the bargaining unit. It is noteworthy, however, that upon dismissing the first application the disclosed circumstances prompted the Board to warn the applicant union in its order, "Should there be another application for certification covering the employees affected by this application, the Board will, at that time, entertain any representations the parties may wish to make with regard to the timeliness of that application".

14. This Board has in the past consistently taken a serious view of any hint of irregularity or fraud in the documentary evidence tendered in certification proceedings. Since the Board must rely extensively upon such evidence in proceedings where the confidentiality of the membership of individual employees in the trade union must be safeguarded, the integrity of such documentary material must be of a high standard. In *International Nickel Company of Canada Limited* [1966] OLRB Rep. Jan. 198 the Board had occasion to review its policies respecting the standard of membership evidence and stated at page 730:

CONSIDERATION OF BOARD POLICIES

In view of the arguments outlined above, it is necessary to examine the Board policies applicable to matters of this kind. The basic principles are well set out in the *Webster Air Equipment Company Ltd. Case, supra*:

...However, since the Board is compelled to rely to such an extent on evidence which, by the very nature of things, is not subject to examination by the parties to the proceedings (See section 72(1) [now section 83(1) of *The Labour Relations Act*], it must be very circumspect in accepting it and it must insist on the highest standards of integrity on the part of those who submit such evidence. Any attempt to mislead the Board or any failure to make full disclosure of all material facts must weigh heavily against an applicant. In dealing with this situation, the Board has made a distinction between two types of cases: (I) where the action impugned is that of a responsible officer or official of a union, and (II) where the action is that of a supporter or canvasser on behalf of an applicant who occupies an inferior office or no office in the union. In so far as the first of these is concerned, the Board said in the *RCA Victor Company Case*, (1953) C.C.H. Canadian Labour Law Reporter, Transfer Binder '49-'54, ¶17,067. C.L.S. 76-412, that even where only a single card is defective and it is submitted with the knowledge of such responsible officer or official, "the Board may come to the conclusion

that it cannot place reliance on any of the evidence of membership submitted by the union". Where the irregularity relates to evidence of membership procured by a person of lesser rank in the union organization, the Board has taken the position that the card in respect of which the irregularity is established is disallowed and the weight to be given to the remaining evidence of membership will depend on the nature of the irregularity and the extent to which the objectionable practice was resorted to in the signing up of members.

To this should be added one further reference to the *RCA Victor Company Ltd. Case, supra*, where, after dealing with the situation of a responsible officer or official of the union knowingly submitting a defective card, the Board went on to say:

...A similar result may follow even in a case where it is impossible to establish that an officer or official of the union had knowledge of the impropriety, but where it is evident that he was so lax in regard to the way in which documentary evidence of payment was obtained that he may reasonably be taken to have shut his eyes to the facts.

It is important to keep in mind the reasoning behind these statements of principle which have been referred to so often in the Board's jurisprudence. The basic question dealt with in every case of non-pay or non-sign or other irregularity is the weight that ought to be given the evidence of membership in the circumstances of the particular case. In matters of this kind the Board is not concerned with penalizing a union but rather with representation. See *Echlin-United of Canada Ltd.*, OLRB Rep. May 1965, p.91; *The Hydro Electric Commission of the City of Hamilton*, [1958] C.C.H. Canadian Labour Law Reports, Transfer Binder, '55-'59, ¶16,120, C.L.S. 76-617. Keeping this in mind, what is intended by the statement in the *Webster Air Equipment Case* that "... even where only a single card is defective and it is submitted with the knowledge of such responsible officer or official, 'the Board may come to the conclusion that it cannot place reliance on any of the evidence of membership submitted by the union.'"? Clearly, what the Board is saying is that the entire evidence is suspect because, having regard to the dependence of the Board on the documentary evidence submitted, how can it rely on any evidence of membership which such an officer or official has either personally obtained or which was obtained by others in association with him or under his direction. However, we point out that the Board did not say that this result follows in every case where a single defective card is submitted with the knowledge of a responsible officer or official. The words used are "the Board *may* come to the conclusion" (emphasis added) and obviously whether it does or does not will depend on the facts of the particular case.

Again, when dealing with a case involving "a person of lesser rank in the union organization" the same basic question must be considered, that is, the effect of the irregularity or irregularities on the other evidence of membership submitted in the case. If such a person was not responsible for other

canvassers or collectors the Board, depending on the circumstances, may merely disallow the card in question or may reject all of the cards signed up by such a person and then deal with the case on the basis of the remaining evidence. If such a person was responsible for the acts of others in the campaign, then the cards signed up by such other persons may also be suspect. See, for example, *Hershey Chocolate of Canada, Limited Case*, OLRB Monthly Report, May 1963, p.73; *Thomas Dellelce and Company Limited Case*, OLRB Monthly Report, Jan. 1962, p.341; *Max Factor and Company Case*, OLRB Monthly Report, Feb. 1964, p.616.

However, in some circumstances, even the facts of rank and file canvassers may affect the weight to be given to evidence of membership apart from the evidence for which they were responsible and despite the fact that the irregularities were not known to responsible union officers or officials. Whether this result follows in any case will depend on how "widespread" is the pattern, in the words of the *RCA Victor Company Ltd. Case*, (*supra*) or in the language of the *Webster Air Equipment Case*, (*supra*), "the nature of the irregularity and the extent to which the objectionable practice was resorted to in the signing up of members". In other words, in the particular circumstances of a case, the Board may conclude that because of the extent of the objectionable practices by rank-and-filers, it is likely that such practices were used by others engaged in the campaign and, further, that if this is the case, the persons responsible for the campaign, if not directly involved, have at the very least failed to live up to their responsibilities. Consequently, all of the evidence may be suspect.

15. Applying the above principles to the instant case, we note that the flaw in the documentary evidence in support of the earlier application was caused by a collector who was a rank and file employee in the bargaining unit, and not a union officer. There is no suggestion of any attempt to deceive the Board. On the contrary, it is common ground that the employee whose signature was misrepresented intended to become a member of the applicant and considered that he had done so. Nor is there any suggestion that the flaw was such as would have been detected but for the laxity on the part of the union officers responsible for the application, or that this was anything more than an isolated incident relating to one card. In such a circumstance, assuming that all of the facts that are common ground before us had been satisfactorily proved at the hearing ordered by the Board, the Board may well have done no more than discount the impugned card and sustained the representative value of the remainder of the cards filed. In that case the applicant would have been certified outright.

16. The extent to which the dismissal of a prior application caused by a cloud on the integrity of the membership documents may serve to weaken the membership evidence in a subsequent application is a question to be decided within the particular circumstances of each case. Considering the facts outlined above in the light of the Board's policies on the standards of membership evidence, we are satisfied that the dismissal of the earlier application by the Board's order of October 22, 1976 does not weaken the membership evidence submitted in the instant application.

17. In fairness to the thorough argument of counsel for the respondent it should be noted that he rested his motion for a representation vote on the cumulative effect of four elements: the outstanding certificate of 1964, the fact that 3 applications were brought by the applicant within this year, the rejection of the applicant's first attempt at certification by the vote of the employees, and lastly, dismissal of the second application under a cloud of misrepresentation. While there is a certain attractiveness to that argument, having found that each of the four elements, taken individually, is worthy of no weight, we are not prepared to say that taken together they should be given any greater value than the sum of their parts. The respondent's request for a representation vote is denied.

18. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on November 2, 1976, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

19. A certificate will issue to the applicant.

DECISION OF J. E. C. ROBINSON, Q.C.

1. I dissent in part.

2. At the outset I must say that I was not a member of the panel that dismissed the application for certification by the United Steelworkers of America in Board File No. 0972-76-R wherein that applicant withdrew its initial application in the face of a proposed hearing by the Board into an allegation of "non sign". One can only speculate why the trade union would withdraw its application in the face of such hearing, if the incident was merely the irregularity described by the majority in its decision.

3. However that may be, neither I, nor the majority heard *viva voce* evidence concerning that "irregularity" and the surrounding circumstances, and accordingly are able only to surmise and draw inferences from the failure of the trade union to subject itself to a hearing before the Board.

4. The majority of the Board has recognized that an employer seeking to obtain evidence from its employees concerning confusion in their minds as to the paying of initiation fees and signing of membership documents, runs the severe risk of running afoul of section 56 of the Act. I endorse that statement.

5. I do not, however, agree that the daily practice of this Board has taught us that objecting employees do not hesitate to register their objections. In my opinion, it would take an employee of exceptional intestinal fortitude, strength and integrity to present himself before the Board to give evidence which might thereby deprive a trade union, which allegedly had obtained membership of over 55% of his fellow employees, from receiving automatic certification. Such action would surely cause a certain ostracism from many of his fellow employees.

6. Having regard to all of the circumstances, including the numerous signings and payments of initiation fees by the employees over a relatively short period of time, I am not "satisfied" that more than 55 per cent of the employees are members of the applicant, so as to give automatic certification to such applicant.

7. Rather, I would adopt the formula conceived by the Board in the *Hydro Electric Commission of Hamilton* case, 58 CLLC 18,120, and order a representation vote among the employees.

8. Only then could I ascertain the voluntary expression of the employees as to their desires.

9. I would so find.

0881-76-M, 0883-76-M, 0884-76-M, 0885-76-M, Dover Corporation (Canada) Limited, Applicant), v. International Union of Elevator Constructors, Local 90, (Respondent).

Arbitration – Strike – Whether employees' refusal to work because of employer's refusal to hire local union members in accordance with a local preference clause violated no-strike provision – Compensation – Whether Board will award damages against the union and the employees.

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members J.D. Bell and O. Hodges.

APPEARANCES: *Ross R. Dunsmore and Robert D. Studdard for the applicant; Stanley Simpson and A. Schosser for the respondent.*

DECISION OF KEVIN M. BURKETT, VICE-CHAIRMAN AND BOARD MEMBER J.D. BELL: December 8, 1976.

2. These grievances, all arising out of the same fact situation, were filed with the Board pursuant to the provisions of Section 112a of the Act. The company alleges that the individual named employees failed to report to work on Monday August 9, 1976 and continued not to report to work through Friday August 14, 1976 and that the union through its agents instructed these employees not to report to work also in violation of Article XIII of the collective agreement.

3. The respondent company had three jobs in progress in Windsor, Ontario at the time of the alleged unlawful strike. These were an apartment construction job on Wyandot Street, hereinafter referred to as the Wyandot job, to which four London based men were assigned, a second apartment job on Chippawa Street employing two London based men and a service modernization job for Bell Canada also employing two London based men. As of Friday August 8, 1976 the Wyandot job was ready for the final safety and mechanical checks (done by a highly skilled mechanic referred to as an adjustor). The Bell Canada job

was about half completed and the Chippawa job had been closed down for lack of power. The grievances before the Board are in respect of the failure of the employees assigned to the Wyandot job, the only construction job in progress at the time, to report for work on Monday August 9 through Friday August 14, 1976. The evidence is clear that the four men assigned to the Wyandot job, Messrs. R. Blanchard, M. Blazs, J. Sandford and R. Thomas, were scheduled to work on that job on Monday August 9 and that none of them reported for work that day or for the succeeding four days. The four men returned to the Wyandot job on Monday August 16, 1976.

4. The events leading up to the absence from work of Messrs. Blanchard, Balzs, Sandford and Thomas can be recounted as follows: In late July the Armour Elevator Company, a non-member of the Canadian Elevator Manufacturers Association (C.E.M.A.) but party to a like collective agreement with the respondent union laid off two of its employees who had been working and were resident in the City of Windsor. The two employees, Messrs. Stark and Moe who were and continue to be members of Local 90 of the International Union of Elevator Constructors, notified the business agent of Local 90, Mr. A. Schlosser, of their lay-off. Mr. Schlosser in turn called Mr. J. McIntyre, the company's acting superintendent in London, Ontario, on August 3rd and spoke with him in respect of the employment rights of the two men laid-off from Armour Elevator Company pursuant to the "Local Preference" clause in the local agreement between the parties. Mr. McIntyre suggested that Mr. Schlosser speak with the company's Head Office and the evidence establishes that late that day or early the next Mr. Schlosser spoke with Mr. E. Aziz, the company's national construction superintendent, and made known to him the position of the union vis-a-vis the proper application of the local preference clause in respect of Messrs. Stark and Moe, the two Windsor residents laid off from Armour Elevator. Mr. Aziz in turn contacted Mr. R. Suddard, a C.E.M.A. Labour Relations representative and then notified Mr. Schlosser that there was no new work available in Windsor and that the company was acting within the collective agreement in refusing to hire Messrs. Stark and Moe. Mr. Aziz testified that at the conclusion of their second conversation Mr. Schlosser told him that none of the London based men would be working in Windsor on Monday (August 9) if the company did not hire the two Windsor based men who had been laid off from Armour Elevator. Mr. Schlosser denied that he had made these statements and testified that he said to Mr. Aziz, "I will do what I have to do and you do what you have to do."

5. Mr. Schlosser admitted that he had spoken by telephone with Messrs. K. Blanchard, M. Blazs and J. Sanford (London based members who were working in Windsor) during the evening of Sunday August 8th. It was his evidence that he notified these men of the situation with respect to Messrs. Stark and Moe. He acknowledged that he reminded these men of a grievance brought by the union under section 112a in respect of the application of the local preference clause in the London area in June of this year, approximately two months before the occurrence of the alleged unlawful strike which is before this panel of the Board. The Board's earlier decision, referred to by the parties as the "Montgomery Award" was in favour of the union's interpretation of the local preference clause. Mr. Schlosser testified that having regard to the situation giving rise to the Montgomery grievance and in light of the company's refusal to hire Messrs. Stark and Moe, he asked the London based men on Sunday August 8 "How did you feel when the Hamilton boys came into London." He further admitted in cross-examination that he also said to the London based men that the \$6,000 spent on the Montgomery grievance didn't do us any good and that "the company is up to its old tricks." None of the men with whom Mr. Schlosser spoke on Sunday August 8 were called to testify.

6. The four men assigned to the Wyandot construction job in the City of Windsor did not report for work on Monday August 9. Instead these men as a group congregated at a restaurant close to the company's London office, went to the company's office, spent a short period of time there and left. Mr. McIntyre, the acting superintendent, testified that he did not know what they did at the office. The evidence is clear that none of these men worked again until the following Monday, August 16, 1976.

7. Mr. Suddard, the labour relations representative attached to C.E.M.A., testified that he attempted to contact Mr. Schlosser on Monday, Tuesday and Wednesday; (August 9, 10, and 11) but was unable to do so. He testified that he left messages with Mr. Schlosser's office but that these went unanswered. Mr. Schlosser testified that he was extremely busy during the week of August 9, that he had been in Kitchener on Tuesday and that he did not know the London based men had failed to report for work in Windsor until Thursday August 12 when he was handed the company application for a cease and desist order at an arbitration hearing into another matter. Mr. Schlosser testified that he contacted Mike Blazs later on Thursday, August 12 and arranged to have the men return to work on Monday August 16.

8. Article XIII of the subsisting collective agreement, which was in operation at the time of the alleged unlawful strike, reads as follows:

"It is agreed by both parties that strikes and lockouts are prohibited in accordance with the terms of the Ontario Labour Relations Act."

The prohibition against strikes and lockouts is found in Section 63 of the Act:

"63. (1) Where a collective agreement is in operation, no employee bound by the agreement shall strike and no employer bound by the agreement shall lock out such an employee.

(2) Where no collective agreement is in operation, no employee shall strike and no employer shall lock out an employee until the Minister has appointed a conciliation officer or a mediator under this Act and,

(1) seven days have elapsed after the day the Minister has released or is deemed pursuant to subsection 3 of section 102 to have released to the parties the report of a conciliation board or mediator; or

(b) fourteen days have elapsed after the day the Minister has released or is deemed pursuant to subsection 3 of section 102 to have released to the parties a notice that he does not consider it advisable to appoint a conciliation board.

(3) No employee shall threaten an unlawful strike and no employer shall threaten an unlawful lock-out of an employee."

The definition of a strike is set out in section 1(1)(m) of the Act:

"'strike' includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a

common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output."

9. The Board in the recently released *Domglass Ltd.* decision, Board File No. 1153-76-U dated October 13, 1976 stated:

On its face, the statutory definition appears to require only that the work stoppage, or other disruption of work, result from the combined or concerted action of employees. The two essential conditions for conduct to be characterized as a strike, therefore, appear to be 1) concerted employee activity; 2) some disruption of the employer's operation."

The Board in that case was asked to read into the definition a further condition that the conduct be carried out for the purpose of obtaining concessions from the employer. The Board found that the definition of strike as set out in the Act is not restricted or qualified by the purpose of the activity. The evidence of a concerted activity can be established by proving that the action was instigated by trade union officers, (see re *Churchill Forest Industries (Manitoba) Ltd. and International Brotherhood of Pulp, Sulphite and Paper Mill Workers, Local 203* (1913) 2 LAC (2d) 301) or by showing that the behaviour of the employees, under the circumstances, was such as to create a presumption that they were acting in concert (see re *Printing Specialties and Paper Products Union, 466 and E.S. and A Robinson (Canada) Ltd.* (1970) 21 LAC 354). The Board is satisfied that in the circumstances of this case the disruption of the employer's operation was caused by the concerted action of its employees. The evidence is clear that the employees had been in conversation on the evening preceeding the work stoppage, that they congregated as a group at the restaurant close to the company's London office on the day of the strike, and that they returned to work as a group the following week. Without at this point making a finding as to the involvement of Mr. Schlosser and the union the Board must draw the inference and find that the named employees of the company acted in concert. Their concerted activities disrupted the operation of the employer and must be found to have been a strike within the meaning of that term as it is defined in The Labour Relations Act.

10. The employees are bound by a collective agreement which became effective on February 28, 1974 and which does not expire until March 31, 1978. The alleged unlawful activity, which has been found to be a strike within the meaning of The Labour Relations Act, occurred during the period August 9 - 14, 1976 inclusive. It must be found, therefore that the strike was in violation of Section 63 of The Labour Relations Act and as a consequence in violation of Article XIII of the collective agreement.

11. The collective agreement and The Labour Relations Act prohibit a trade union from calling or authorizing an unlawful strike and indeed an obligation extends to the trade union through its officers, officials or agents to take "prompt, effective and affirmative action" to attempt to end any unlawful strike. (See *Oil, Chemical and Atomic Workers and Polymer Corporation Ltd.* (1959) 10 LAC 51 (Laskin) AFFD (1961) OR, 178, (1961) OR 438, *U.S.W. Local 6571 and Lake Ontario Steel Co. Ltd.* (1968) 19 LAC 260 (Arthurs), *Printing Specialties and Paper Products Union, 466 and E.S. and A. Robinson (Canada) Ltd.* (1970) 2 LAC 354 (Brown) and *Algoma Steel Corporation Ltd. and U.S.W.* (1974) 7 LAC (2d) 375 (Shime)). There are two questions which must be answered, therefore, in determining whether a trade union is liable for damages arising out of an unlawful work stoppage. First-

ly, did the union call or authorize the work stoppage and secondly, did the union properly attempt to end the work stoppage.

12. The evidence of Mr. Schlosser is that he did not call, encourage or support the work stoppage and that he did not know until Thursday, August 12, 1976 that a work stoppage was in progress. If the Board accepts the evidence of Mr. Schlosser who was the only official, agent or officer of the union involved in this matter, then clearly the union cannot be found to be liable for damages. Without making a finding as to whether Mr. Schlosser threatened the work stoppage the evidence is clear that he actively attempted to secure employment in the City of Windsor for Messrs. Stark and Moe, the laid-off members of Local 90 resident in the City of Windsor, and that he spoke with the London based men who were working in Windsor on Sunday, August 8, the day before the work stoppage. His comments to the men as revealed in evidence (paragraph 5 herein) were unsettling at best. Although Mr. Schlosser denied having directed the men to engage in a work stoppage the nature of his comments, as admitted in evidence, and the coincidence of the work stoppage occurring shortly after his conversation with the London based men, has left a serious doubt in the mind of the Board as to the extent of Mr. Schlosser's involvement. Similarly, the Board has serious doubts that a union official who had spoken with the company on August 3rd and 4th in respect of the employment of Messrs. Stark and Moe and who had "informed" the London based men on August 8th as to the difficulties he was encountering would have been unaware until Thursday, August 12th that the London based men had not reported to work from Monday, August 9th.

13. It was within the power of the union to call as witnesses the men to whom Mr. Schlosser spoke the evening prior to the unlawful strike. It did not. No explanation was offered for the failure to call any of the London based men who are named in individual grievances as witness and from this failure it is open to the Board to infer that their testimony would have been adverse to the respondent. The effect of a party's failure to call a witness has been dealt with in *The Law of Evidence in Civil Cases*, Sopinka and Lederman, (1974) Butterworths wherein at p. 535 the authors state:

"In *Blatch v. Archer* Lord Mansfield stated:

'It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.'

The application of this maxim has led to a well-recognized rule that the failure of a party or a witness to give evidence, which it was in the power of the party or witness to give and by which the facts might have been elucidated, justifies the court in drawing the inference that the evidence of the party or witness would have been unfavourable to the party to whom the failure was attributed."

The same principle is stated in the *Government of Saskatchewan and Saskatchewan Government Employees Association* (1975) 11 LAC (2d) 244 wherein at page 249 it is stated:

"The jurisprudence makes it abundantly clear that the failure to bring before the tribunal some witness who could testify to the facts in issue is not with-

out significance and where the failure to produce such a witness is not explained, the inference may be drawn that the unproduced testimony would have been contrary to the case of the party affected by the inference or at least would not have supported it: see *Murray v. Saskatoon*, [1952] 2 D.L.R. 499, 4 W.W.R. (N.S.) 234 (Sack. C.A.); *Diederichs v. Metropolitan Stores Ltd.* (1957), 6 D.L.R. (2d) 751, 20 W.W.R. 246 (Sask. Q.B.); *Mudrazia v. Holjevac et al.*, [1970] 1 O.R. 275, 8 D.L.R. (3d) 221 (Ont. H.C.J.).”

In the circumstances the Board has been persuaded by the circumstantial evidence and the inference it must draw from the failure of the London based men to testify and finds that Mr. Schlosser in fact called the unlawful strike and that he was aware of its continuation and that prior to the evening of Thursday, August 12th he did nothing whatsoever to indicate to the striking employees that he was opposed to the strike.

14. An arbitration Board has power to award damages as consequential relief for a breach of a collective agreement, including authorizing or encouraging an illegal strike. The leading decision on the subject is re *Oil Chemical and Atomic Workers and Polymor Corporation Ltd.* (1959) 10 LAC 51 (Laskin) AFFD (1961) O.R. 178 (H.C.J.) and (1961) OR 438 and (1962) S.C.R. 339. In the recent *Blouin Drywall Contractors Ltd.* and *United Brotherhood of Carpenters Local 2486* (1975) 8 O.R. (2d) 103(C.A.) the court stated:

“... certainly, the Board is bound by the grievance before it but the grievance shall be literally construed so that the real complaint is dealt with and the appropriate remedy provided to give effect to the agreement provision and this whether by way of declaration or rights or duties, in order to provide benefits or performance of obligations or a monetary award required to restore one to the proper position he would have been in had the agreement been performed.”

In the circumstances of this case the Board finds that the trade union through its official A. Schlosser called the unlawful strike and that it did nothing to dissuade the employees from violating the collective agreement from Monday, August 9 through Thursday, August 12, inclusive. The Board directs, therefore, that the trade union compensate the company for all real losses suffered as a result of the unlawful work stoppage which commenced on Monday, August 9 and concluded on Monday, August 16, 1976.

15. The applicant company seeks damages from the individual employees against whom separate grievances have been filed. The Board, having regard to its findings in respect of the union's involvement and having regard to the dependency of the individual employees upon the trade union for their employment and having regard to the Board's direction against the union which will make the company “whole”, refuses, in the circumstances of this case, to order damages against the individual employees.

16. The applicant company also seeks exemplary damages against the trade union. The Board refers to the *Oil Chemical and Atomic Workers and Polymer Corporation Ltd.* decision, 10 LAC at p. 57 wherein Mr. Laskin as he was then stated:

“It is desirable at this point to point up a distinction between the imposition of penalties and the award of damages. It is a distinction taken, and in this

Board's view, properly taken, in the award in *Re U.A.W. & C.C.M.* (1961), 3 Lab. Arb. Cas. 837. This board, sitting as a civil tribunal to resolve contract interpretation disputes, has no punitive function but is charged only with redressing private wrongs arising from breach of obligations assumed as a result of negotiation. The board's remedial authority if it has any, must be addressed to the vindication of violated rights by putting the innocent party, so far as can reasonably be done, in the position in which he or it would be if the particular rights had not been violated. The redress, if any can be given, must be suited to or measured by the wrong done. A board of arbitration is not, however, a criminal court. True enough, it may play a role in passing upon or modifying a penalty imposed by an employer as a matter of discipline, but in so doing it is merely assessing the permissible limits of employer action taken under the collective agreement and not fashioning a penalty to reward an innocent party."

(See also *re Maritime Employees Association and Halifax Longshoremen's Association I.L.A. Local 269* (1976) 10 LAC (2d) 225 (Christie)). In the absence of clear language in the collective agreement permitting a Board of Arbitration to award exemplary or punitive damages the Board rejects the company's request in this regard for want of jurisdiction.

17. The Board will remain seized of this matter in the event the parties are unable to implement its direction.

DECISION OF BOARD MEMBER O. HODGES:

1. I join with my colleagues in finding that the individually named employees working out of London at Windsor did not report to work on Monday, 8th August, 1976, nor for the rest of that week, and that their absence from work was a strike in violation of the collective agreement.

2. I cannot find that the strike of these employees was called, authorized, encouraged or supported by the business agent of Local 90, Mr. A. Schlosser, and I believe that my colleagues are mistaken in the inferences they draw from the evidence as to the involvement of Local 90 of the trade union. It therefore follows that I do not join in the award of damages set out in paragraph 14 of the majority decision. I agree with my colleagues and join in the decision expressed in paragraph 16 of their award in denying the exemplary damages sought by the applicant company.

3. This is an arbitration of a work stoppage in violation of a construction industry collective agreement, the application of the terms of which is marked by a recent history of confrontations over practices which the parties had long accepted at the job site, and which the applicant has recently sought to alter.

The collective agreement expresses poorly what the trade union and the employers have until recently lived with in a relationship designed to accommodate the industrial requirements for a skilled, mobile work force employed on relatively short-term construction projects undertaken by a number of employers competing in the business of selling and installing substantially the same product.

An accommodation of unemployed mechanics and helpers in the area in which they reside is a cost-saving factor clearly in the company's interest. It is further reasonable and desirable that employees not be required to travel and live away from home when that accommodation is possible.

The unlawful strike by these employees resulted from a refusal by the employer to employ two of their fellow union members, Moe and Stark, in the area where those two men resided. The sacrifice of a week's work to enforce a reasonable working condition says a great deal for the importance attached to the issue by these men – they are ready to accept a lay-off to maintain the practice of being employed near where they live whenever possible. However, the law does not permit the withdrawal of labour during the term of a collective agreement for any reason whatsoever.

4. The grievances of Moe and Stark have been dismissed by the unanimous finding of this same panel of the Board. That Board found that the language of the collective agreement as it currently exists, does not support the right to work in their "home area" which Moe and Stark believed they had. See Board file No. 0092-76-M. Those grievances were the questions in issue which the London based members of Local 90 obviously hoped to cure by their strike. Plainly they hoped to influence a CEMA employer to hire the laid off Moe and Stark in order to get on with the work stopped as a result of the strike. However, the employers resisted. Conceivably, had they yielded, it would have helped to cut the losses which may have resulted from the absence of their London based employees.

5. The evidence respecting Mr. Schlosser is critical because he is the only link between the union and the strike. If the union is to be held liable for substantial damages, this Board must be convinced that Mr. Schlosser either encouraged the unlawful strike, or, having learned of it, did not act promptly to try to end it. It is well settled that the union does not guarantee the performance of the obligations in the agreement, but must only take all reasonable steps to ensure that they are performed. The majority find Mr. Schlosser by inference accountable for the strike. With the testimony of Mr. Schlosser clearly denying the inference, I have no difficulty in finding Mr. Schlosser free of responsibility for the work stoppage. Mr. Schlosser was first elected Business Agent in May, 1976; he had been on the Executive Board of Local 90 for five years. The Local 90 office is in Hamilton from where Mr. Schlosser services the area which in addition to Hamilton, includes Kitchener, Niagara Falls, London, Sarnia and Windsor.

The witness testified during examination-in-chief in reply to the testimony of a company witness as to conversations preceding the work stoppage. He said: "I did *not* indicate that the men would not be at work." He further testified that August 9 - 13 was a busy week and he was away from his office until Thursday evening. He received the company's grievance from Mr. Suddard while attending another arbitration hearing in Toronto on Thursday August 12. He did not know then that the men were not working. Further, when he returned home Thursday night he tried to reach each of the London men. However, only Ken Blanchard could be contacted. Mr. Schlosser instructed this man to go back to work at Windsor as soon as possible, and to tell the others to do likewise.

Cross-examined on this part of his testimony Mr. Schlosser was unshaken. He further testified in cross-examination that there had been no Executive Meeting of Local 90 during the weekend preceding the work stoppage. It was not unusual, he said, to speak to union mem-

bers on Sunday evening to discuss union affairs of current interest. On Sunday evening, August 8, he had spoken to three of the London men. He had called them to discuss the unemployment situation of Moe and Stark. His comment to the men was: "The company is up to its old tricks – not abiding by the terms of the agreement or arbitration." He said: "I told them the truth – what they decided was up to them. They did not ask me if they should walk out." He said he could not be misunderstood. He said he had no indication that they were not going to work. He also advised them during these discussions "it is illegal to go on strike." He reminded them that the Montgomery case was the same situation. At the end of these telephone discussions he thought the situation was back to normal.

Mr. Schlosser also testified in cross-examination that he was informed by Moe and Stark on July 30 that they were out of work. He advised them that if they were not working by August 5 or 6 to proceed by way of a grievance and they agreed.

Mr. R.D. Suddard, called in reply, testified in chief that on Monday August 9 he tried three or four times to reach Mr. Schlosser at the union office, but he was reported out and he didn't see him until Thursday. Cross-examined, the witness admitted that *he had not tried to reach Mr. Schlosser* at his residence through the answering service. He admitted that most people in labour and management relations in the industry knew each other. There is therefore no evidence that Mr. Schlosser knew about the strike. The company allowed that situation to continue while its damages mounted and now comes before this Board seeking damages because of the failure of Mr. Schlosser to fulfil his obligations as a union official.

6. The evidence in my opinion does not support the finding of the majority that Schlosser was responsible for the strike. The majority speculate that testimony from the London men to whom Mr. Schlosser spoke on Sunday evening, August 8 would support the employer's allegation and that to avoid such liability they were not called by the union to testify. However that may be, any of these men could have been subpoenaed to testify by the company and they were not. I believe my colleagues to be wrong in convicting the union on the circumstantial evidence adduced. It is my view that the employees were not subpoenaed by the applicant because it would be difficult to collect damages from those workers and continue to retain them as employees.

7. Considering all of the circumstances and the lack of direct evidence I dismiss the grievance against Mr. Schlosser and the union.

8. The union instructed the London men to get back on the job at Windsor. They complied immediately. They lost pay for a week. The grievance of Moe and Stark has been settled in favour of the employer's interpretation of the agreement. The assessment of damages against the union put the responsibility for the work stoppage in the wrong place. The inference I draw from the evidence is that the employees simply took matters into their own hands to enforce a condition they understood to be covered by the collective agreement. The Board has now settled that issue by dismissing the grievance of Moe and Stark. A finding of damages against the employees who struck would have served no useful end. A reprimand would have been sufficient had the Board found the employees alone were responsible for the work stoppage.

0092-76-M International Union of Elevator Constructors, Local 90, (Applicant), v. **Canadian Elevator Manufacturers' Association**, more particularly, Otis Elevator Company Limited, (Respondent).

- and -

0093-76-M International Union of Elevator Constructors, Local 90, (Applicant), v. Canadian Elevator Manufacturers Association and more particularly, Dover Corporation (Canada) Limited, (Respondent).

- and -

1023-76-M International Union of Elevator Constructors, Local 90, (Applicant), v. Canadian Elevator Manufacturers' Association, (Respondent).

Arbitration - Parties - Practice - Whether unaccredited Association a proper party - Whether local preference hiring clause applies to all members of local or just to employees of employer - Whether local preference clause applies to work in progress - Whether the Board will be bound by a previous decision regarding the same collective agreement.

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members J.D. Bell and O. Hodges.

APPEARANCES: *Stanley Simpson and A. Schlosser for the applicant; Ross Dunsmore and R.D. Suddard for the respondents.*

DECISION OF THE BOARD: December 8, 1976

1. These are grievances filed under section 112(a) of the Act against Dover Corporation (Canada) Limited, Otis Elevator Company Limited and the Canadian Elevator Manufacturers Association. The grievances are filed on behalf of Robert Stark and Gordon Moe and allege that Messrs. Stark and Moe have been denied rights in accord with Article 2, page 3 of the local agreement. The union seeks all wages and benefits lost by these men as a result of the failure of the named companies to put them to work in accord with article 2, page 3 of the local agreement. It was decided by the Board that it would hear evidence and make a determination as to the merits of the complaint and remain seized of the matter in the event the grievances were successful and the parties could not agree on the amount of compensation.

2. A preliminary matter was raised as to whether the grievance against the Canadian Elevator Manufacturers Association (hereinafter referred to as C.E.M.A.) was proper. Counsel for the respondent argued that the acts of individual employers do not bind the Canadian Elevator Manufacturers Association and vice versa and that in any event Article XIV of the master agreement (arbitration) makes it clear that grievances and arbitrations are to be between the individual employer and the local. Article 1 of the collective agreement which is captioned "Parties to the Agreement" states as follows:

"The CANADIAN ELEVATOR MANUFACTURERS is authorized and empowered to negotiate and execute this Agreement for and on behalf of the Employers, i.e. Dover Corporation (Canada) Limited, Montgomery Elevator

Co. Limited, Otis Elevator Company Limited and Westinghouse Canada Limited.

The INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS is authorized and empowered to negotiate and execute this Agreement for and on behalf of the Unions, i.e. its Ontario Locals 50, 90 and 96.”

It is clear from this article that the C.E.M.A. acted as the negotiating agent and was empowered to execute the agreement on behalf of the employers who are party to the agreement. C.E.M.A. is not itself a party to the agreement and is not itself liable for the actions taken by the employers party to the agreement. There is no reference to the Canadian Elevator Manufacturers Association in the recognition clause, and indeed, Article XIV, the arbitration clause, stipulates that any difference or dispute regarding the application or construction of the agreement is to be settled by the employer and the local union. There is no evidence before the Board that the C.E.M.A. is an accredited employer organization, and accordingly, the Board finds that the association is not a party to or bound by the collective agreement which it negotiated on behalf of certain named employers, and is not therefore a proper respondent in these proceedings. It is the individual employers for whom it negotiated who are party to and bound by the collective agreement. In the circumstances the Board dismisses the grievance directed against the Canadian Elevator Manufacturers Association (Board File No. 1023-76-M).

3. The fact situation as it is relevant to a determination of the grievance before this Board can be summarized as follows: On July 29, 1976 Messrs. Stark and Moe were laid-off for lack of work from the Armour Elevator Co. The Armour Elevator Company is not a member of the Canadian Elevator Manufacturers Association and is not a party to the collective agreement under which the instant grievance has been filed. Rather, the Armour Elevator company is party to a separate but like agreement with the trade union. Messrs. Stark and Moe, who are long standing members of Local 90, contacted Mr. A. Schlosser, the business agent of Local 90, shortly after being laid-off. He advised Messrs. Stark and Moe to make application for employment with the C.E.M.A. companies operating in Windsor and in turn contacted those C.E.M.A. companies with work in Windsor (Otis and Dover) and attempted to secure employment for Messrs. Stark and Moe under the provisions of Article 2, “local preference” of the local agreement. The companies refused to employ Messrs. Stark and Moe and denied that their refusal to employ was in violation of the “local preference” clause. The evidence establishes that none of the C.E.M.A. companies were hiring at the time Messrs. Stark and Moe made application for employment but rather they had jobs which were in various stages of progress. The evidence further establishes that the employers would have had to lay-off London based employees in order to give effect to the demands of Mr. Schlosser in respect of the rights of Messrs. Stark and Moe under the “local preference clause”.

4. The aforementioned “local preference” clause, Article 2 (para. 4) of the local agreement, which flows from and forms a part of a master agreement, provides as follows:

“It is agreed that Local 90 of the City of Hamilton has jurisdiction over the men now resident in the Cities of Windsor, London and Sarnia, and all men who might be permanently stationed in these cities during the life of this Agreement, and that the men resident in these cities shall have local preference whenever possible on any work covered in this Agreement.”

It is the union's position that as members of local 90 resident in the City of Windsor Messrs. Stark and Moe who were out of work, were entitled to displace non-Windsor resident employees of the C.E.M.A. companies who were working in Windsor at the time of their lay-off. The union relies on the "local preference" clause in support of its contention.

5. The application of the "local preference" clause to the facts before this Board gives rise to three distinct questions of interpretation:

(1) The union argues that the word "men" as used in the "local preference" clause refers to members of local 90 and that it therefore confers a right of local preference upon Messrs. Stark and Moe who are Local 90 members resident in the City of Windsor. The companies, on the other hand, argue that the word "men" as used in the local preference clause is restricted to employees of one or other of companies party to the agreement and consequently it does not confer rights upon non-employees, such as Messrs. Stark and Moe, who are not covered or bound by the agreement.

(2) The union argues that the preference which is "local" is in respect of each of the individual cities named and that as a result Messrs. Stark and Moe who are resident in the City of Windsor, enjoy a preference over those resident in London, Sarnia or anywhere else. The companies, on the other hand, argue that the three cities referred to in the clause (London, Sarnia and Windsor) comprise a single unit for purposes of "local preference" and that consequently Messrs. Stark and Moe do not enjoy a preference over London men working in Windsor but rather, their preference extends only to men from outside London, Windsor or Sarnia.

(3) The union argues that the term "work" as used in the local preference clause includes work in progress and as a result it argues further that Messrs. Stark and Moe were entitled to displace the London based employees who were already engaged on Windsor projects. The companies on the other hand argue that the term "work" is restricted to work which is about to commence and not work that is already in progress. The companies' interpretation would preclude Messrs. Stark and Moe from bumping London based employees from the existing Windsor jobs.

The phrase "whenever possible" as it appears in the "local preference" clause has also given rise to argument between the parties. That phrase has been interpreted within the context of the subsisting collective agreement between the parties by another Board of Arbitration. (See *Re International Union of Elevator Constructors Local 90 and Canadian Elevator Manufacturers Association*, dated June 14, 1976, Board file no. 1553-75-M). This Board, in the absence of an inherent flaw in law or reasoning considers the interpretation as set out at paragraph 16 of the above-noted award to be persuasive and in support refers to the following passage from *Canadian Johns-Manville and International Chemical Workers Union* (May 19, 1976) 12 LAC (2d) (Burkett)

"It is acknowledged that the doctrine of *Stare decisis* does not apply in labour arbitrations; one board of arbitration is not bound by the decision of another as it relates to the same issue even if that issue had been decided within the context of the same bargaining relationship. This is not to say, however, that arbitrators are not and should not be persuaded by prior decisions dealing with similar situations. In a general sense arbitral jurisprudence plays a

constructive role in the collective bargaining process and performs a positive directory function. A series of decisions which lend a consistent interpretation to a piece of contract language fix the meaning of that language in its labour relations context and provide the parties with a high degree of certainty as to the precise meaning of the language which they are incorporating into a collective agreement thereby minimizing both the possibility of future disagreement and future 'litigation'. In this general sense arbitral jurisprudence also underscores the consequences of not including certain language in a collective agreement (i.e. contracting out) which also minimizes the possibility of future disagreement. In a more specific sense arbitrators are acutely sensitive to the need for consistency and predictability within a particular collective bargaining relationship and are therefore loathe to upset the award of a predecessor board dealing with an identical issue between the same parties unless the predecessor board has been wrong. A previous finding on the same issue imparts an obligation to an arbitrator who wishes to depart from it to clearly analyze the shortcomings of the previous award and lay a solid foundation for the departure; (see re *Air Canada and Canadian Air Line Employees Association* 10 LAC (2d) 113 (O'Shea), *Electric Reduction Co. of Canada Ltd. and O.P.E.I.U.* [1973] 3 LAC (2d) 87 (Hartt), *R.C.A. Ltd. and Electric Workers* [1973] 2 LAC (2d) 143 (Rayner)), to do otherwise undermines the binding nature of the adjudication, creates uncertainty and encourages resort to arbitration as an alternative to negotiation."

6. The first issue to be decided is the interpretation to be placed on the word "men" as it appears in the "local preference" clause. The positions taken by the respective parties have been capsulized in the preceding paragraph. The recognition clause, Article II of the master agreement, which is restricted to employees reads as follows:

"The Employers recognize the Unions as the exclusive bargaining representatives for all Elevator Constructor Mechanics and Elevator Constructor Helpers, *in the employ of the Employers* engaged in the installation, repair, maintenance and servicing of all equipment referred to in Article IV, Par. 2 and Article IV (A)." (Emphasis added.)

Similarly, the scope clause Article XX which states in part –

"This agreement shall be binding upon all employees and Local Unions 50, 90 and 96 ..."

restricts the application of the agreement to "employees". The parties to any collective agreement are free, however, to confer rights or benefits on persons not covered or bound by the agreement which they have negotiated. It was found in *Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters, etc.* [1975] 57 D.L.R. 199 (C.A.) at page 208:

"While ss. 37(9) and 42 of the Labour Relations Act do not extend the binding effect of a collective agreement or arbitration award made pursuant thereto beyond 'employees', *I do not regard these sections as prohibiting the negotiating parties from agreeing to confer rights or benefits on non-employee*

members of the union and that such rights and benefits may then be the subject of grievance procedure and within the jurisdiction of an arbitration board under the agreement. Collective agreements in this industry have developed to include benefits to non-employees who are union members. In this industry, there is no continuing employment and so collective agreements have developed to ensure a source of labour to the contractor, to provide for preference in the employment of trade union members and, while establishing the terms and conditions of such employment to provide other benefits which may become due or payable at a time when the union member is not employed.” (Emphasis added.)

The Board must decide if the parties to this dispute have conferred a right of local preference on persons who are not covered by the collective agreement between them.

7. The Board is satisfied that the “local preference” clause could be given meaning if either the word “employees” was substituted for the word “men” *or*, if the phrase “local 90 members” was substituted for the word “men” as it appears in the clause. The substitution of the phrase “local 90 members” would confer rights upon Messrs. Stark and Moe. The substitution of the word “employees” would restrict the application of the clause to persons laid-off from the C.E.M.A. companies. The master agreement considers laid-off persons to be “employees” at Article X (A) para. 6 and 8 and as a result the restrictive interpretation urged by the company also gives meaning to the clause. If these persons (laid-off) were not contemplated within the agreement as employees, then clearly the correct interpretation to be given the word “men” would be the expansive interpretation argued by the union, i.e. that it means local 90 members; otherwise the preference would have no meaning as it would be in respect of persons already at work.

8. The Board in deciding which of two plausible interpretations best fits with the agreement as a whole has been persuaded to accept the more restrictive interpretation argued by the company. *Firstly*, the word “men” has been used in Article 4 of the local agreement (living expenses) and it has been used twice in Article 7A of the local agreement (transportation) and in each of these instances the word “men” has been used as a synonym for the word “employees”. In the context of Article 4 and Article 7A it can bear no other interpretation. The same interpretation of the word “men” in the “local preference” clause gives meaning to that clause and while it does not indicate conclusively that the parties intended it to bear a similar meaning in respect of “local preference” it is persuasive of such an intent. *Secondly*, Article Z (A) para 3 specifically confers rights on persons not party to or bound by the agreement (i.e. job applicants). Article X (A) para. 3 reads as follows:

“An Employer shall use the Local Union as a first source of job applicants. In the event that the Local Union is unable to satisfy satisfactorily the Employer’s request within forty-eight (48) hours, the Employer may obtain applicants from any other available source. The Employer has the right to reject any applicant referred to him by the Local Union, however, a claim that the Employer has unreasonably rejected such an applicant may be the proper subject matter of a grievance.”

The parties at Article X (A) para. 3 addressed themselves to the question of conferring rights on persons not covered or bound by the agreement and made explicit provision to do

so. There is no such explicit provision in the "local preference" clause and in the face of the restrictive meaning given to the word "men" elsewhere within the local agreement, the Board must find that the language of the "local preference" clause does not confer rights or benefits upon persons not covered or bound by the agreement. In the circumstances, the Board must find that the grievances of Messrs. Stark and Moe must fail. There is no evidence to suggest that as of the date they sought to exercise rights under the "local preference" clause that they maintained status as laid-off employees of any C.E.M.A. company and indeed, it was not argued that they did.

9. It is not necessary for the Board to decide the other issues arising from these grievances. The grievors did not enjoy any rights or benefits arising out of the "local preference" clause in the agreement between the union and the C.E.M.A. companies and accordingly, the grievances must fail.

1042-76-R Canadian Union of Public Employees, (Applicant) v. Dufferin-Peel Roman Catholic Separate School Board Office Employees Association, (Respondent Trade Union), v. The Dufferin-Peel Roman Catholic Separate School Board, (Respondent Employer).

Successor Status – S54 – Effect of predecessor organization not meeting the Board's test of trade union status.

BEFORE: Ian C.A. Springate, Vice-Chairman and Board Members E. Boyer and J.E.C. Robinson, Q.C.

APPEARANCES: *Helen Browne for the applicant; no one appearing for the respondent trade union, D.W. McEntee, R.E. LeMay and R. Friday appearing for the respondent employer; Barbara E. Brisley and Elizabeth Marchant appearing on behalf of the objectors.*

DECISION OF THE BOARD: December 6, 1976.

1. This is an application under section 54 of The Labour Relations Act for a declaration that the applicant Canadian Union of Public Employees (hereinafter referred to as "CUPE") has, by reason of a merger, amalgamation or transfer of jurisdiction, acquired the rights, privileges and duties of the Dufferin-Peel Roman Catholic Separate School Board Office Employees Association (hereinafter referred to as "the Association"). All of the employees affected by this application are employed in the administration offices of The Dufferin-Peel Roman Catholic Separate School Board (hereinafter referred to as "the School Board").

2. During the hearing held in this matter it became obvious to the Board that it would not be able to grant the application. This fact, as well as a summary of the reasons therefore, was explained orally to the parties at that time. The Board now proposes to set out in somewhat more detail the reasons behind its decision.

3. In response to a request by the Association, the School Board in October of 1974 agreed to voluntarily recognize the Association as the bargaining agent for certain of its employees in its administration office. This voluntary recognition, in turn, resulted in the signing of a purported collective agreement between the Association and the School Board on January 22, 1975. This agreement was later supplanted by a new agreement dated January 23, 1976 and stated to run from January 1, 1976 until December 31, 1976. On July 29, 1976 CUPE filed an application for certification with respect to a proposed unit of employees in the School Board's administration office but later, upon becoming aware of the existence of the aforementioned agreement, withdrew its application on the understanding that it was untimely. Shortly after this occurred, however, an understanding was reached between the officers of the Association and a representative of CUPE that the employees involved would be given an opportunity to decide as to whether or not they wanted the Association to merge, amalgamate or transfer its jurisdiction to CUPE. On September 2, 1976 all of the employees who attended at a meeting called for that purpose voted in favour of such a merger, amalgamation or transfer of jurisdiction.

4. Nothing in the events described above would, by themselves, justify denying CUPE's application to the Board. However, a complicating factor arises from the fact that at the time it was voluntarily recognized by the School Board the Association did not possess a formal constitution. Such a constitution was, however, adopted at a meeting of employees held some 15 minutes prior to the meeting at which the aforementioned vote concerning the proposed merger, amalgamation or transfer of jurisdiction to CUPE was taken.

5. The Labour Relations Act in section 1(1)(n) defines a trade union, in part, as "an organization of employees formed for purposes that include the regulation of relations between employees and employers..." For an association of employees to fit within the term "organization of employees" as that term is used in the Act, the Board requires that it have an existence separate and apart from its individual members and that such a separate existence be evidenced by a written constitution. (See: *The Elgin County Roman Catholic Separate School Board*, [1970] OLRB Rep. Feb. 1352.) The existence of such a constitution ensures that the organization is a viable entity and also that prospective members will have an opportunity to inspect the constitutional provisions governing its purposes, organization and conduct prior to determining whether or not they wish to take out membership in the organization (See: *Gulf Oil Canada Limited*, [1973] OLRB Rep. May 256.)

6. In that the Association lacked a constitution at the time it received voluntary recognition from the School Board we must conclude that at the time it was not a trade union within the meaning of the Act. Further, in that only a trade union or a council of trade unions may enter into a collective agreement with an employer pursuant to section 1(1)(n) of the Act, we are forced to conclude that the agreements entered into between the Association and the School Board were not collective agreements within the meaning of the Act. The adoption of a constitution by the Association on September 2, 1976 might, under other circumstances, have turned the Association into a bona fide trade union at that time. However in this case, for the reasons set out below, even this could not legally occur.

7. The agreement between the Association and the School Board contains, in article 20.01, the following provision:

“All new Employees whose classification falls within the scope of the Agreement must become members of the Association upon completion of the probationary period as a condition of employment.”

Mrs. Fran Smith, the President of the Association, testified that this provision has been interpreted by the Association as meaning that each employee covered by the agreement who has completed his or her probationary period automatically becomes a member of the Association and is not required to formally apply for membership.

8. Section 1(1)(j) of the Act defines a member of a trade union in the following terms:

“‘member’, when used with reference to a trade union, includes a person who,

- (i) has applied for membership in the trade union, and
- (ii) has paid to the trade union on his own behalf an amount of at least \$1 in respect of initiation fees or monthly dues of the trade union,

and ‘membership’ has a corresponding meaning;”

This definition clearly implies that an employee must take the positive step of actually applying for membership in a trade union before becoming a member of the union. Further, we are of the view that even if the use of the term “includes” in section 1(1)(j) means that an employee can become a union member pursuant to some other positive act on the part of the employee involved to signify that he desires such membership.

9. Our determination that an employee must engage in a clear positive act to join a trade union finds support in the following excerpt from the decision of the late Mr. Justice Rand when delivering the majority decision of the Supreme Court of Canada in *Orchard v. Tunny* (1957) 8 D.L.R. (2d.) 273 at pp. 281-282:

“Apart, then, from statute, that a Union is held together by contractual bonds seems obvious. **each member commits himself to a group** on a foundation of specific terms governing individual and collective action, a commitment today almost obligatory, and made on both sides with the intent that the rules shall bind them in their relations to each other. That means that each is bound to all the others jointly. **The terms allow for the change of those within that relation by withdrawal from or new entrance into membership.** Underlying this is the assumption that the members are creating a body of which they are members and that **it is as members only that they have accepted obligations**; that the body as such is that to which the responsibilities for action taken as of the group are to be related.” (emphasis added).

The attention of the parties is also drawn to the decision of the Ontario Court of Appeal in *Astgen v. Smith* (1967) 7 D.L.R. (3d) 657 at p.662, wherein in delivering the majority decision of the Court Mr. Justice Evans made the following statements regarding the International Union of Mine, Mill and Smelter Workers:

12. Having regard to this determination, we must conclude that there cannot even be a predecessor trade union in these proceedings as that term is used in section 54 of the Act, and neither can there be any rights, privileges or duties to which the applicant can succeed.

13. The Board hereby reaffirms its oral ruling of October 22, 1976 wherein it dismissed this application.

0242-76-M International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant), v. **The Electrical Power Systems Construction Association**, (Respondent).

Parties – Arbitration – S 112a – Whether a member of a council of trade unions that signed the collective agreement may itself refer a grievance to arbitration.

BEFORE: Ian C.A. Springate, Vice-Chairman and Board Members P.J. O’Keeffe and N. Satterfield.

APPEARANCES: *Douglas Wray, Ben Loughlin and others for the applicant; H.A. Beresford, Ross Dunsmore and others for the respondent.*

DECISION OF THE BOARD: December 6, 1976.

1. This is a referral of a grievance to the Board for final and binding determination pursuant to section 112a of The Labour Relations Act.

2. This referral first came before a differently constituted panel of the Board on May 21, 1976, but was adjourned, for reasons not here relevant, without a hearing as to its merits. The matter then came before this panel on June 23, 1976. At that time counsel for the respondent challenged the right of the applicant to refer a grievance to the Board claiming that the parties to the collective agreement alleged to have been breached were the respondent, The Electrical Power Systems Construction Association (“EPSCA”), being an employers’ organization, and the Ontario Allied Construction Trades Council (“the Council”) being a council of trade unions of which the applicant is a member. It was his submission that only the Council and EPSCA had the right to refer a grievance arising out of the collective agreement to the Board for a determination. Counsel for the applicant objected to the raising of this objection at such a late stage in the proceedings, and requested that the Board refuse to even consider it.

3. In filing its reply on Form 81 the respondent in listing the style of cause showed the applicant as being the Council. However, apart from this action the respondent failed to raise its objection until the first hearing held before this panel of the Board. The respondent’s delay in raising the objection was, of course, a discourtesy both to the applicant and to its counsel. Further, had the respondent’s objection been concerned solely with a procedural or technical irregularity the Board might well have been prepared to hold that the respondent had in fact waived its right to now even raise the objection. [See: *Regency*

Towers Hotel Ltd. and Hotel and Club Employees' Union, Local 299, (1973) 4 L.A.C. (2d) 440 (S. Schiff, chairman.)} In the circumstances of this case, however, the Board was of the view that it was faced with an objection going not merely to a procedural or technical irregularity, but going instead to the fundamental jurisdiction of the Board to even entertain this referral, and that such an objection cannot be deemed to be waived by the mere passage of time. (For an analogous situation see *Re Dryden Paper Co. Ltd. and United Paperworkers' Union, Local 105 and 1323*, (1976) 11 L.A.C. (2d) 337 [H.D. Brown, Chairman.]) This being the case the Board ruled orally at the hearing that it would hear the merits of the respondent's objection. The Board also ruled in favor of the request of counsel for the applicant for an adjournment to allow him time in which to prepare to meet the objection. After a number of further adjournments the Board, on October 8, 1976, entertained the representations of the parties with respect to the merits of the objection.

4. As a general principle the Board lacks jurisdiction to rule on the merits of grievances arising out of collective agreements. However, section 112a(1) of the Act gives the Board such a jurisdiction with respect to grievances arising out of collective agreements negotiated in the construction industry. The wording of section 112a(1) is as follows:

"Notwithstanding the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 37, *either party* to a collective agreement between an employer or employers' organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable, to the Board for final and binding determination."
(Emphasis added.)

The issue here is whether or not the applicant is a party to the collective agreement giving rise to the grievance referred to the Board. Should the applicant not be a party to the collective agreement, then it would appear that the Board lacks the jurisdiction to even entertain the referral.

5. The heading, preamble and relevant clauses of the collective agreement are set out as follows:

"COLLECTIVE AGREEMENT

by and between

THE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION
(hereinafter called the "Council")

WHEREAS EPSCA is an Association formed to represent all Employers in collective bargaining and on their behalf enter into collective agreements covering those of their employees in the bargaining unit as hereinafter defined;

AND WHEREAS the Council is formed to represent the Unions listed in Article 2 in collective bargaining with EPSCA and to enter into collective

agreements on their behalf and on behalf of their members in the bargaining unit as hereinafter defined;

AND WHEREAS it is the desire of the parties to conclude an agreement with a new concept designed to bring stability, harmony, and an effective method to amicably resolve problems in the electrical power systems sector of the construction industry in the Province of Ontario,

NOW THEREFORE the parties hereby agree as follows:

Article 1 RECOGNITION

- 1.1 EPSCA recognizes the Council as the exclusive bargaining agency for a bargaining unit comprising employees as defined in section 1.3 and foremen as defined in section 1.4 of Employers engaged in work for the Generation Projects Division and the Lines and Stations Construction Departments of the Transmission and Distribution Projects Division in the Province of Ontario for Ontario Hydro...

Article 2 MEMBERS OF THE COUNCIL

- 2.1 It is recognized that the Council comprises certain International Unions whose names are listed hereunder:

International Association of Heat and Frost Insulators and Asbestos Workers

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers

International Brotherhood of Painters and Allied Trades

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

International Union of Operating Engineers

Labourers' International Union of North America

United Brotherhood of Carpenters and Joiners of America

- 2.2 Individual Unions of the Council shall be hereinafter called the "Union".

Article 3

FORM OF AGREEMENT

- 3.1 This Agreement shall consist of a master portion which shall apply to employees and to foremen who work for Employers while such employees and foremen are engaged in work as described in Article 1, Recognition. There shall be one appendix negotiated by and for each member Union of the Council and one appendix for foremen. The appendices shall apply province-wide.

Article 4 APPENDICES

- 4.1 The trade appendix applicable to each member Union of the Council will contain those provisions which are not common to all member Unions of the Council, and those provisions will apply to appropriate members of each International Union as provided in its appendix while they are working under the terms of this Collective Agreement. Such appendices shall be deemed to be part of this Agreement.

- 4.2 Items which can be included in the trade appendices are:

- wages
- classifications
- benefits (pension, welfare and supplementary unemployment benefits)
- hours of work not covered in the master portion of this Agreement
- overtime rate
- premiums
- shift differential rate
- inclement weather pay
- apprenticeship and training programs
- seniority
- supply of tools
- key tradesmen
- protective clothing and equipment
- welding tests
- travel and transportation

– Employer's responsibility

- 4.3 Because a variety of practices exist in the construction industry regarding representation of foremen, an appendix applicable to foremen shall form part of this Agreement. The Foreman Appendix will be negotiated by the executive officers of EPSCA and the Council.

Article 5
EXECUTIVE COMMITTEES

- 5.1 The Council and EPSCA shall each appoint an Executive Committee. The Executive Committee of EPSCA shall consist of the Board of Directors and the officers of EPSCA. The Executive Committee of the Council shall consist of the officers of the Council and the senior representative of each Union. The Committees will meet together at least annually to review matters associated with the administration of this Collective Agreement, with the intent that administrative policies will be formulated for consideration by each Executive Committee. The executive Committees will also meet together to receive reports of joint committees established under this Agreement.

Article 31
TERM OF AGREEMENT

- 31.3 Proposed amendments to the master portion of this Agreement shall be negotiated by the Senior Bargaining Committees which are the executive officers of EPSCA and the Council respectively.
- 31.4 Proposed amendments to the Appendices to this Agreement shall be considered by the Trades Bargaining Committees named by the Board of Directors of EPSCA and the Officers of the Council. Amendments agreed upon through Trade Appendix negotiations are subject to approval by the EPSCA Board of Directors and the Officers of the Council.
- 31.5 The proposed amendment or amendments agreed upon in writing at the bargaining sessions provided above will be incorporated as a revision on the date agreed to by the EPSCA Board of Directors and the Officers of the Council."

6. Articles 28 and 29 of the collective agreement set out a grievance and arbitration procedure. At the beginning of the grievance procedure only the representatives of the appropriate employer and union are directly involved. However, increasingly the representatives of EPSCA and the Council become involved in the process, and indeed only EPSCA and the Council are entitled under Article 29 to refer a grievance to a board of arbitration for adjudication. The opening sentences of Article 29 state as follows:

Article 29

ARBITRATION

- 29.1 If any dispute about the interpretation or application of particular clauses of this Agreement or about an alleged violation of this Agreement cannot be settled through the grievance procedure outlined in Article 28, the matter may be submitted within thirty (30) days of its failure of settlement by grievance procedure by either EPSCA or the Council to a Board of Arbitration for adjudication. The party desiring to submit the dispute to arbitration shall notify the other party in writing of its desire and the notice shall contain the name of the first party's nominee to an arbitration board..."

Article 28 refers to employee grievances, Council grievances and EPSCA grievances. No mention is made, however, of grievances being filed by either a specific employer or a specific trade union.

7. The master portion of the collective agreement runs to 32 pages and contains a total of 32 articles. It covers such topics as hours of work, room and board allowances, holidays, vacation pay and union security. At the end of the master portion of the agreement is to be found the signing page, which is set out as follows:

"IN WITNESS WHEREOF the parties through their duly authorized officers have executed this Agreement, this 28th day of August, 1974.

For:

THE ELECTRICAL POWER
SYSTEMS CONSTRUCTION
ASSOCIATION

President

Director

Director

Director

For:

ONTARIO ALLIED
CONSTRUCTION
TRADES COUNCIL

President

Vice-President

Secretary-Treasurer

For the Member Unions

Director	International Association of Heat and Frost Insulators and Asbestos Workers
General Manager	International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers
Secretary-Treasurer	International Brotherhood of Painters and Allied Trades
	International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America
	International Union of Operating Engineers
	Labourers' International Union of North America
	United Brotherhood of Carpenters and Joiners of America"

8. In accordance with Article 4 of the collective agreement there are a number of separate appendices, one covering foremen and the remainder covering members of the individual unions belonging to the Council. The appendix relating to the Teamsters Union ("the Teamsters appendix") is headed up as follows:

"INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA
APPENDIX

to the
Collective Agreement
 by and between
THE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION
 (hereinafter called "EPSCA")
 and the
ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL
 (hereinafter called the "Council")

The appendix deals primarily with wage rates, transportation allowances, protective clothing and equipment and lay-offs. There is no separate signing page to the appendix.

9. It was contended by counsel for the applicant that the master portion of the collective agreement was executed by each of the member unions of the Council, and that it followed that each union is therefore a party to the agreement. In support of this position he referred the Board to the decision of the board of arbitration in *Re Metropolitan Toronto Apartment Builders Association and Toronto Building & Construction Trades Council*, (1972) 1 L.A.C. (2d) 201 (H.D. Brown, Chairman.) Counsel also drew to the Board's attention the fact that the grievance referred to the Board alleges a breach of the lay-off procedure set out in the Teamsters appendix. With respect to the fact that the collective agreement specifies that only EPSCA and the Council may take a grievance to arbitration counsel contended that because section 112a is stated to operate "notwithstanding the grievance and arbitration provisions in a collective agreement", this did not limit the right of the applicant to refer a grievance to this Board.

20. With respect to the last point referred to above, it would appear that even if we were to accept counsel's submission that any limitations on the applicant's rights to go to arbitration under the collective agreement are not binding on this Board when considering a referral under section 112a, the essential issue still remains. Only a party to a collective agreement may refer a grievance to the Board under this section and the question of whether or not the applicant enjoys such a status is what is now at issue.

11. The Teamsters appendix does not, of course, purport on its face to have any existence separate and apart from the master portion of the collective agreement. As noted above, it is not separately executed and thus can in no event be construed as a collective agreement in its own right. Indeed, Article 4 of the master portion of the collective agreement stipulates clearly that the "appendices shall be deemed to be part of this agreement." From this it follows that if the applicant has the right to refer a grievance to this Board it must be because it is a party to the collective agreement as a whole, and not merely because there is an appendix to the agreement relating specifically to its members. (The situation in this case should be distinguished from one where a number of unions sign a series of short collective agreements with an employer or employers' organization with each of these agreements incorporating by reference a standard set of master terms. In such a situation each union would in fact be a party to its own collective agreement.)

12. The Board has closely analyzed the collective agreement before it and has concluded that it is what it purports to be, namely, a collective agreement entered into between EPSCA and the Council. While the applicant and members of the applicant may be bound by the agreement, the applicant is not a separate party to the agreement. In reaching this determination we have considered the entire collective agreement and in particular those articles referred to above. However, of major importance in our determination are the heading of the agreement, wherein it states that it is “by and between” EPSCA and the Council, as well as Article 1.1 wherein EPSCA recognizes the Council as the exclusive bargaining agent for the one bargaining unit covered by the agreement. The fact that the arbitration procedure set out in the collective agreement is stated to be restricted to use only by EPSCA and the Council, while not determinative of the matter by itself, is, we feel, a strong indication that only the Council and EPSCA were intended to be parties to the agreement. We recognize that if one were to look at the signing page of the agreement by itself it is arguable as to whether the representatives of the individual unions were signing as the representatives of separate parties to the agreement or as part of the Council’s signatory team. However, having regard to the full text of the collective agreement the Board feels confident that the representatives of the individual unions signed as members of the Council’s signatory team. In this regard we would note that all such signatures fall under the column headed up in bold type “For: ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL.”

13. As noted above counsel for the applicant referred the Board to the decision of the board of arbitration in the *Metropolitan Toronto Apartment Builders* case. In that case the majority of the board held that an employers’ association which was party to an agreement (which agreement, the majority noted might not fall within the definition of a collective agreement under The Labour Relations Act) could not claim damages against a council of trade unions which was also party to the agreement due to a breach of the agreement by a union belonging to the council. It was the view of the majority that the grievance would more properly have been brought against the particular union. In reaching this decision the majority found that on the face of the agreement the individual unions belonging to the council were themselves separate parties and separate signatories to the agreement. The wording of the collective agreement before this Board differs markedly from the wording of the agreement before the board of arbitration, and this difference is sufficient to cause this Board to reach a somewhat different conclusion on the issue of the identity of the parties to the agreement.

14. Having determined that the applicant is not a party to the collective agreement before it, the Board finds that the applicant is not entitled to refer a grievance relating to that collective agreement to the Board pursuant to section 112a.

15. Having reached this conclusion, the Board would stress that its decision is based on the particular collective agreement before it. We recognize that there may be situations where a number of trade unions group themselves into an uncertified council of trade unions for the sole purpose of facilitating joint bargaining with an employer or employers’ organization. In such cases it may well be that each of the individual unions would be a separate party to the collective agreement for the purposes of its administration and that any one of them could by itself either take a grievance forward to arbitration pursuant to terms of the collective agreement itself or refer a grievance to this Board under section 112a. In the case before us, however, it is clear that the only two parties to the collective agreement for all purposes are EPSCA and the Council.

16. Having reached this determination, the Board must now turn to consider a request made by counsel for the applicant in his final submission to the Board. Counsel requested that if the Board found that the referral had not been properly brought, that it amend the style of cause to now show the Ontario Allied Construction Trades Council as the applicant. It was counsel's contention that since no grievances had been taken to arbitration under this agreement in the past that if a mistake had been made it had been a reasonable one in the circumstances. Counsel for the respondent strongly opposed this request.

17. The Board's authority to correct mistakes in the names of the parties to a proceeding is set out in section 93 of the Act as follows:

"Where in any proceedings before the Board the Board is satisfied that a *bona fide* mistake had been made with the result that the proper person or trade union had not been named as a party or has been incorrectly named, the Board may order the proper person or trade union to be substituted or added as a party to the proceedings or to be correctly named upon such terms as appear to the Board to be just."

A party seeking to rely on this section has the onus of satisfying the Board that in fact a *bona fide* mistake has occurred. (See: *Alcan Colony Construction Company*, [1963] OLRB Rep. June 172.) As the Board noted at the hearing, had the applicant early in the proceedings indicated that the name of the applicant union had inadvertently been employed instead of that of the Council, the Board might well at that time have been disposed to amend the application. However, what occurred instead was that the applicant took the firm position that as an entity separate and distinct from the Council it was entitled to refer the grievance to the Board, an action which does not appear to be consistent with the type of *bona fide* mistake contemplated by section 93. (See: *Gaytown Sportswear*, [1964] OLRB Rep. March 680.) Of additional concern to the Board in this matter was the fact that the request to amend the style of cause came not directly from the Council but rather from the applicant trade union. Having regard to these points, the Board declines to order that the name of the Council be substituted for that of the applicant trade union. However, nothing in this decision is meant to prejudice the rights of the Council to refer the grievance to the Board on its own behalf.

1462-76-R Teamsters Local 879 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (Applicant), v. **Drummond, McCall & Co., Limited**, (Respondent), v. Group of Employees, (Objectors).

Employees – Whether an employee dismissed prior to application to be counted for purposes of membership evidence where a S79 complaint of improper discharge has been filed.

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members O. Hodges and J. E. C. Robinson, Q.C.

APPEARANCES: *I. J. Thomson and Don Swait for the applicant; J. B. Noonan, Briah Bush, Peter Harris and P. J. Travers for the respondent; Roy Roussel and James Hinchcliffe for the objectors.*

DECISION OF THE BOARD: December 14, 1976.

4. Having regard to the agreement of the parties the Board further finds that all employees of the respondent working at Hamilton, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, watchmen and security staff, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. The membership position of the applicant as of the terminal date of this application was one card short of 55 per cent of those in the bargaining unit. The union submitted 20 cards which corresponded with the 38 names listed by the employer as within the bargaining unit. The union did file with the Board, however, one “lost card” which was not used for purpose of the count. That card was on behalf of Mr. G. Kirilo, a former employee of the company who had been discharged by the company prior to the date of application. The union which has filed a section 79 complaint alleging that Mr. Kirilo was discharged because of his trade union activities argued at the hearing that his name should be added to the schedules and his card counted. The respondent employer argued, on the other hand, that the Board should follow its normal practice and only consider those persons who were employees as of the date of application. In view of the section 79 complaint the employment status of Mr. Kirilo is tentative. He may as a result of the section 79 complaint be returned to employment effective prior to the date of application in which case he would be an employee as of the date of application and eligible for purpose of the count. On the other hand, his termination might be confirmed in which case he would *not* be an employee as of the date of application nor eligible for purpose of the count. The Board confirms the position it took at the hearing. In circumstances where a card or cards filed on behalf of an employee who may have been discharged contrary to the Act may be determinative of the union’s entitlement to outright certification the panel of the Board dealing with the certification application must await the disposition of the section 79 complaint. It would be contrary to the intent and spirit of the Act to allow an employer to terminate an employee(s) because of trade union activity and, even as an unforeseen consequence, deprive the trade union of its entitlement to outright certification.

6. The Board was also in receipt of a statement of desire in this matter signed by a sufficient number of the bargaining unit employees if it were proved to be a voluntary expression of those who signed it would, notwithstanding the disposition of Mr. Kirilo's section 79 complaint, cause the Board to order a vote. In the circumstances the Board decided to hear the evidence as to the origination, preparation and circulation of the statement of desire. In the event it were voluntary then Mr. Kirilo's card could not in any event entitle the union to outright certification and the Board would order a vote; in the event it proved not to be voluntary it was the Board's intention to await the outcome of the section 79 complaint.

7. The Board has reviewed the membership evidence in relation to the requirement for outright certification and the "second check" has revealed that Mr. Kirilo's card could not in any event entitle the trade union to outright certification. It is not necessary, therefore, for the Board to make a finding as to the voluntariness of the statement of desire. If Mr. Kirilo is reinstated in employment as of the date of application his card will then be valid membership evidence giving the trade union 21 valid membership cards. Mr. Kirilo's name, however, must also be added to the list of employees within the bargaining unit as of the date of the application, thereby bringing the total number in the bargaining unit to 39. The union would now require 22 valid cards in order to establish 55 per cent membership support. With Mr. Kirilo's card the union would have submitted 21 cards, leaving itself one card short of the required 55 per cent membership support required for outright certification.

8. In the circumstances it is not necessary for the Board to rule on the voluntariness of the statement of desire in that the effect of a finding of voluntariness would be to cause the Board to order a vote which it must do pursuant to section 7(2) of the Act in view of the fact that not less than 45 per cent and not more than 55 per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on November 30, 1976, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of the Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

9. Accordingly, the Board directs that a representation vote be taken of the employees of the respondent in the bargaining unit. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

10. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

11. The matter is referred to the Registrar.

1367-76-R Gulf Oil of Canada Employees' Bargaining Unit, (Applicant), v. Gulf Oil Canada Limited, (Respondent), v. Oil, Chemical & Atomic Workers International Union, (Intervener).

Membership Evidence – Whether the Board will accept combination applications and receipts where the receipt is not signed by the applicant.

BEFORE: Ian C. A. Springate, Vice-Chairman and Board Members J. D. Bell and M. Fenwick.

APPEARANCES: Maurice Green and Griff Welsh for the applicant; L. A. Rodgers, W. E. Baker and John Thomson for the respondent; Daniel Ublansky and John More for the interven-
er.

DECISION OF THE BOARD: December 20, 1976.

4. Having regard to the agreement of the parties, the Board finds that all employees of the respondent working at its Clarkson Branch in the City of Mississauga, save and except dispatchers, foremen, persons above the rank of dispatcher or foreman, office and sales staff and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. The evidence of membership filed by the applicant takes the form of combination applications and receipts most of which contain the following wording:

GULF OIL CANADA EMPLOYEES' BARGAINING UNIT

I hereby apply for membership in Gulf Oil Canada Employees' Bargaining Unit. I authorize Gulf Oil Canada Employees Bargaining Unit, to represent me and act on my behalf in all respects concerning the terms and conditions of my employment with my employer.

DATED _____ Signature _____

Receipt of \$1.00 payment in respect of initiation fees is confirmed.

Paid by: _____ dated _____

Signature of Collector dated _____

6. In a number of instances beside the words "paid up" on the receipt portion of the membership card is to be found the signature of the employee who also signed the application portion of the card. However, in the great majority of cases the name of the employee has been written in on the receipt portion of the card by the same person who signed the re-

ceipt as collector. In other words, with respect to most of the membership cards the receipt portion is signed by a collector but is not at the same time also countersigned by the employee applying for membership.

7. The Board, which must rely heavily on the evidence of membership filed in support of an application for certification, very much prefers that the receipt portion of combination applications and receipts be not only signed by the person collecting the money referred to, but also countersigned by the employee applying for membership so as to corroborate that the money was in fact paid. Lack of such a counter-signature has the effect of weakening the reliability of the evidence of membership and, particularly where there is some doubt concerning the procedures utilized in obtaining its evidence of membership, the absence of a counter-signature may weigh heavily against a trade union applying for certification. (See: *The Board of Education for The Borough of East York*, [1975] OLRB Rep. Oct. 785.) However, whether or not the lack of a counter-signature will result in the Board dismissing the application or, perhaps, directing the taking of a representation vote in circumstances where the applicant would otherwise be entitled to outright certification, must depend on the particular circumstances of each case. (See: *Mercury Terrazzo Limited*, [1970] OLRB Rep. June 291 and the cases referred to therein.)

8. In the instant case Mr. Keith Frost, who served as the collector with respect to the great majority of the membership cards, testified under oath that in every instance where he acted as collector the employee first signed the card and paid him a dollar before he immediately proceeded to complete the receipt portion. Neither the respondent employer nor the intervenor trade union presented any evidence or made any representations which might cause the Board to doubt that in fact a dollar was paid by each of the employees applying for membership in the applicant.

9. After considerable deliberation the Board, in the particular circumstances of this case, has decided that those cards which do not bear an employee's counter-signature on the receipt portion, but where Mr. Frost acted as collector, are sufficiently cogent to justify certification of the applicant without the taking of a representation vote. Having reached this conclusion there is no need for the Board to decide what weight, if any, is to be given to those membership cards lacking counter-signatures where someone other than Mr. Frost acted as collector.

10. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on November 15th, 1976, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

11. A certificate will issue to the applicant.

0776-76-R Labourers' International Union of North America, Local 183, (Applicant), v. **Kenmount Holdings Ltd.**, (Respondent).

Bargaining Unit – Cleaning and Maintenance – Whether a Unit comprising of two buildings appropriate – Effect of interchange on days off – Effect of a finding that single building is the appropriate unit where the unit would then comprise only one employee.

BEFORE: D. H. Kates, Vice-Chairman and Board Members F. W. Murray and H. Simon.

APPEARANCES: *George Allen and Debra Waisglass for the applicant; John P. Sanderson and Henry Korenblum for the respondent.*

DECISION OF THE BOARD: December 10, 1976.

2. The only issue raised by the parties is whether the appropriate bargaining unit ought to encompass each of the superintendents assigned to the respondent's apartment buildings at 3 and 5 Glamorgan Avenue in Metropolitan Toronto. The two buildings are basically similar in size and nature and are administered by the one company. The two superintendents affected by this application are employed by the respondent and perform essentially the same services. The parties indicate by the agreed statement of fact submitted to the Labour Relations Officer that interchange between the two buildings is confined to once a week during the course of the superintendents' day off. This procedure was adopted by agreement of the two superintendents and not by direction of the employer. The applicant submits that one unit ought to be deemed appropriate encompassing employees assigned to both apartment buildings. The respondent argues the contrary, indicating that the Board ought to split the bargaining units.

3. In the *Hi-Ho Curb Serv-us Limited* case [1963] OLRB Rep. April 1 the Board indicated in like circumstances the following approach to resolving the difficulties described herein with respect to the appropriate bargaining unit:

“In situations where an employer has employees at more than one location in a geographic area the Board takes into account a number of factors in determining what constitutes an appropriate bargaining unit. More particularly, the Board considers whether there is an interchange of employees between locations, the number of employees and the type of operation carried on at each location. As well the Board takes into account the history of bargaining units in a particular type of operation. A further consideration is the desire of the parties.”

4. Although the Board has grave doubts in finding the existence of a regular functional interchange between the superintendents assigned to both buildings, we nevertheless view that particular factor in context with other factors such as the type of operation under consideration and the number of employees affected by the application. In the former instance the Board is dealing with a respondent employer whose operations pertain to managing two apartment buildings. For this purpose, it has engaged two superintendents who essentially discharge the same responsibilities and are subject to the same terms and conditions of employment. And in meeting their responsibilities the superintendents' physical community of interest is such that they may relieve each other in the other's absence

from work. Moreover, the evidence further established that should the Board declare a unit appropriate that is confined to the one apartment building we would be depriving each superintendent of bargaining rights by operation of section 6(1) of the Act. The documentary evidence of membership shows that each desires the benefits of collective bargaining through the applicant trade union as their freely designated bargaining agent. In the particular circumstances of this case the Board is satisfied that a bargaining unit encompassing employees assigned to each of the respondent's apartment buildings ought to be found to be appropriate for collective bargaining.

5. The Board therefore finds that all employees of the respondent engaged in cleaning and maintenance at 3 Glamorgan Avenue and 5 Glamorgan Avenue in Metropolitan Toronto, including resident superintendents, save and except property managers, persons above the rank of property manager, office and clerical staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

6. The Board is satisfied, on the basis of all the evidence before it, that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time of the application was made were members of the applicant on 30th July, 1976, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

7. A certificate will issue to the applicant.

1110-76-R United Electrical, Radio and Machine Workers of America (UE), (Applicant), v. **Trent Metals Limited**, (Respondent), v. Group of Employees, (Objectors).

Membership Evidence – Effect of form 8 not disclosing that a Collector loaned one applicant the one dollar fee, and did not collect on the loan.

BEFORE: D. H. Kates, Vice-Chairman, and Board Members W. H. Wightman and A. Hershkovitz.

APPEARANCES: *Val Bjarnason and P. How for the applicant; B. R. Baldwin and A. Clark for the respondent; David James and Derek Smith for the objectors.*

DECISION OF THE BOARD: December 6, 1976.

3. The parties raised the question of whether persons engaged as trainees under a Canada Manpower Industrial Training Programme ought to be included in the appropriate bargaining unit. Apparently These persons are assigned as employees to the respondent's plant with a view to training them in a particular facet of the respondent's manufacturing process. The programme is administered by The Sir Sandford Fleming Community College in Peterborough and each trainee is enrolled as a student at the school. During the period of

the trainee's tenure at the respondent's plant he is paid an hourly wage. The amount expended by the employer is reimbursed by the Department of Manpower by approximately 85%. The Board is of the view that the seven trainees employed by the respondent ought to be excluded from the appropriate bargaining unit on the basis of the same considerations as applied in excluding students employed during the school vacation period and persons employed on a co-operative training programme with a community college. It does not follow from the foregoing, however, that these persons by virtue of their exclusion from a full-time bargaining unit ought to be denied as employees the rights of representation. It is therefore our intention to follow the like procedure as applied by the Board in dealing with part-time bargaining units by declaring, in these circumstances, two units appropriate for collective bargaining (see *The McDonalds Restaurants Limited* case [1973] OLRB Rep. May 287).

4. The Board finds, having regard to the evidence, that all employees of the respondent company in the City of Peterborough, save and except foremen, persons above the rank of foreman, office and sales staff and persons engaged as trainees under Canada Manpower Industrial Training Programme, constitute a unit of employees of the respondent appropriate for collective bargaining (hereinafter referred to as bargaining unit # 1).

5. Counsel for the respondent filed charges relating to allegations of non-pay committed by representatives of the trade union during the course of its organizational campaign. At the hearing of this matter the evidence established that Mr. M. Gilbreath is employed by the respondent as a truck driver and was approached by Mr. Terry Grisdale, another employee, to sign a membership card in support of the applicant's campaign. He agreed to sign the card but because he was short of cash he undertook to pay the dollar on the next pay day. As events unfolded, Mr. Gilbreath changed his mind about supporting the applicant and never approached Mr. Grisdale with a view to paying back the dollar. In the interim, Mr. Grisdale had submitted the card to Mr. Howe, the applicant's business agent charged with the responsibility of supervising the campaign, with a view to processing the same before this Board. Mr. Howe noted that this particular card appeared proper in the same manner as the twenty-four cards that he had heretofore submitted to the Board a week earlier. In the result, it was only after the application along with the tainted card had been filed that Mr. Howe would have had reason to discover the existence of the lone non-pay. Mr. Howe testified that he only learned of the non-pay upon being advised by his superior Mr. Bjarnason who was subpoenaed to adduce evidence as to his role as signatory to the *Declaration Concerning Membership Documents* (Form 8). There is no real dispute as indicated by the evidence that no financial sacrifice was made with respect to the lone card filed on the applicant's behalf in the name of Mr. Gilbreath. The evidence further discloses that Mr. Grisdale was engaged by the applicant as an in-plant organizer with no experience in matters pertaining to the requirements of the Board with respect to the collection of the dollar. We are satisfied as well that to the extent that he felt it necessary Mr. Howe made some attempt to explain the requirements of the Labour Relations Act to Mr. Grisdale but without apparent success. Mr. Grisdale was responsible for securing the signature of another member whose card apparently stood up to the test of the Board's standards of propriety with respect to its rules on membership evidence.

6. In the result the Board is of the view that the two cards secured by Mr. Grisdale during the course of the applicant's campaign ought, in accordance with our past policy, to be set aside. In making this ruling the Board is not intending that the other card secured by Mr. Grisdale is necessarily tainted. Rather, the Board is suggesting that the quality of super-

vision extended Mr. Gridale in his efforts to secure members on behalf of the applicant trade union is sufficiently suspect as to cast a doubt on the membership cards for which he was responsible.

7. The Board is satisfied on the basis of all the evidence before it that not less than forty-five per cent of the employees of the respondent in bargaining unit #1 at the time the application was made, were members of the applicant on October 1, 1976, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

8. A representation vote will be taken of the employees of the respondent in bargaining unit #1. All employees of the respondent in bargaining unit #1 on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

9. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

10. The matter is referred to the Registrar.

11. As a result of the foregoing, it will not be necessary to inquire into the origination preparation and circulation of the statement of desire signed on behalf of employees comprising bargaining unit #1.

12. The Board further finds that all employees engaged as trainees under The Canada Manpower Industrial Training Programme by the respondent company at Peterborough, save and except foremen, persons above the rank of foreman, office and sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining (hereinafter referred to as bargaining unit #2).

13. The Board is satisfied on the basis of all the evidence before it that less than fifty-five per cent of the employees of the respondent in bargaining unit #2 at the time the application was made, were members of the applicant on October 1, 1976, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

14. A certificate will issue to the applicant with respect to bargaining unit #2.

15. Mr. Wightman's views on the Board's rulings with respect to bargaining unit #2 will issue in due course.

DECISION OF BOARD MEMBER AL HERSHKOVITZ

1. I concur in the designation and decision re unit #2.

2. I dissent in the matter which is designated as unit #1.

3. The matter before the Board is the allegation that Mr. Gilbreath did not pay money on his behalf as indicated on the evidence of membership filed with the Board.

4. Terry Grisdale approached Mr. Gilbreath to sign an application for union membership. Mr. Gilbreath signed the card but advised Terry Grisdale that since Friday of that week would be his first pay day and did not have a dollar, Mr. Grisdale offered to loan Mr. Gilbreath the dollar on the promise that Mr. Gilbreath would repay the loan on Friday, Sept. 24th.

5. Mr. Grisdale handed over the signed card with a dollar attached to Mr. Howe the union organizer which was then forwarded on Monday to the Board.

6. Mr. Grisdale sought out Mr. Gilbreath on Friday, Sept. 14th in order to get his dollar back and could not find him since he was out on delivery. On Monday, September 27th, Mr. Grisdale once again approached Mr. Gilbreath for the dollar. He was told that he would see him later. A couple of weeks later he again approached Mr. Gilbreath for the dollar and was told that he had changed his mind about joining the union and refused to repay the loan.

7. When Mr. Gilbreath took the stand he readily admitted that he had asked Mr. Grisdale to advance the dollar and would repay him on his first pay day. He further admitted that when approached for the repayment of the dollar he told Mr. Grisdale he would repay the loan later. He further admitted that when approached once again for the repayment of the loan he stated that he had changed his mind about joining the union and refused to repay the loan which was made to him in good faith.

8. It was established that Mr. Grisdale had last belonged to a union 8 years ago, had never been involved in union organizing before. As an employee of Trent Metals he felt the need for a union and approached Mr. Howe, organizing representative for the U.E. in Peterborough to inquire as to how to go about getting his fellow employees to join the union. Mr. Howe advised him to bring as many of his fellow employees to the union hall where the matter of joining the union would be discussed with them. Mr. Grisdale succeeded in bringing 23 of his fellow workers to the union hall.

9. Mr. Howe explained the procedure required under the Labour Relations Act and they then proceeded to sign the 23 workers.

10. Since this took place after work and they were anxious to leave, Mr. Howe obtained the assistance of another business representative as well as Mr. Grisdale. Mr. Grisdale supervised the signing of one card. *Mr. Grisdale is a member of the bargaining unit.*

11. This was the first time that Mr. Grisdale participated in the ritual of obtaining a signed application for union membership.

12. Mr. Grisdale advised Mr. Howe that there were about 4 drivers that he felt he could sign up for the union and was given a number of cards.

13. Mr. Howe did not become aware of the loan advanced by Mr. Grisdale until the notice of hearing on the alleged violation.

14. The question before the Board is whether a loan advanced in good faith is sufficient cause to nullify that card. Boards, when faced with this same question have ruled for the applicant union.

15. (a) Sacks - footnote 308, added Stanley Steel Co. Ltd. (1972) O.R.B. Rep. 181; William H. Rorer (Canada) Ltd. 1073 O.L.R.B. Rep. 483. It appears from the Skene Carriage, St. Thomas and Rorer cases that a loan is not unacceptable to the Board where it is made bona fide i.e. with an intention to repay.

(b) Particular reference should be made to the case of A.M.C. & B.W. applicant William Rorer respondent and group of employees (objectors) (file 4042-73-R Dec. 73) before Rory F. Egan, Vice-Chairman.

16. The facts established in the A.M.C. & B.W. - William Rorer case clearly parallels those in the foregoing cases.

17. The card that Mr. Grisdale countersigned at the union hall was signed under proper supervision and there is no question of origin or authenticity except by contamination with the signing of the second card which was handled in such manner by Terry Grisdale who having been instructed in the proper manner of obtaining signed cards, nevertheless, through inexperience, did not clearly understand the instructions.

18. Since in my mind the bona fide of the 2 cards in question is clearly established and the union has more than 55% of the eligible cards, I find that the union should be certified.

1759-75-M Ontario Public Service Employees Union, (Applicant), v. Sheridan College of Applied Arts and Technology, (Respondent).

Employees - Colleges Collective Bargaining Act, 1975, S82 - Whether secretary to Management classification excluded as employed in a confidential capacity - Whether secretary to Women's Advisor employed in a confidential capacity on matters relating to employee Relations - Schedules 1 and 2 of Colleges Collective Bargaining Act - S1 of Act - Effect of doing some counselling and educational work - Effect of access to confidential material -

- Whether exclusion reading "employee relations" has wider effect than "Labour Relations"
- Whether secretary is excluded as employed in confidential capacity regarding budget formulation.

BEFORE: M. G. Picher, Vice-Chairman, and Board Members H. J. F. Ade and E. Boyer.

APPEARANCES: *G. A. Richards and John Lasruk for the applicant; Richard Drmaj, Helen Satchell, John Lynch and G. R. Massey for the respondent.*

DECISION OF THE BOARD: December 23, 1976.

1. This is a reference under section 82 of the Colleges Collective Bargaining Act, 1975.

2. That statute was enacted to provide for and regulate collective bargaining in Ontario's Colleges of Applied Arts and Technology, popularly known as "Community Colleges."

3. Section 82 of the Act is as follows:

“If, in the course of bargaining for an agreement or during the period of operation of an agreement, a question arises as to whether a person is an employee, including a question as to whether a person employed as a chairman, department head, director, foreman or supervisor is employed in a managerial or confidential capacity pursuant to clause L of section 1 and the schedules, the question may be referred to the Ontario Labour Relations Board and its decision thereon is final and binding for all purposes”.

The above section is similar in effect to section 95(2) of The Ontario Labour Relations Act.

4. The sole issue before the Board, raised by the applicant union, is the employment status of Mrs. Helen Satchell, who occupies the position of Secretary to Mrs. Shelagh Wilkinson, the Women’s Advisor to the President and Director of the Centre for Women of Sheridan College of Applied Arts and Technology. The applicant submits that Mrs. Satchell is an employee within the bargaining unit described in Schedule 2 of the Act. The respondent argues that her duties and responsibilities exclude her from the bargaining unit on two grounds. Firstly, as one employed in a confidential capacity to a management person who is involved, at the policy level, in the development and administration of programs and budgets. And secondly, as one employed in a confidential capacity in matters relating to employee relations. These arguments are based on exclusions provided in both Schedule 1 and Schedule 2 to the Act, which will be examined below. Evidence respecting Mrs. Satchell’s duties and responsibilities was adduced both before an Examiner and at a subsequent hearing of the Board.

5. The Board must, of necessity, closely examine the duties and responsibilities of Mrs. Satchell’s immediate superior. At the risk of oversimplification it may be said that Mrs. Wilkinson’s role with the College may be broadly divided into three segments. Firstly, she is a planner and policy-maker, secondly, she is an educator, and thirdly she is an advisor and case worker in the nature of an ombudsman.

6. As planner and policy-maker she has primary responsibility for the development of a women’s program within the College. That program was instituted in response to the Affirmative Action Guidelines of the Ministry of Colleges and Universities. For this function she consults with and is directly responsible to the President of the institution. Her task in policy and planning includes the preparation of a Status of Women Report, which is now in progress. The report is to be a comprehensive examination of all aspects of the role and status of women, whether students, support staff or teaching staff within the College. Her report is meant to be both descriptive and prescriptive, it will recommend changes in existing policies, structures and programs within the College, as well as the introduction of new ones. As Women’s Advisor, Mrs. Wilkinson participates in the deliberations of the Executive Committee of the College.

Her planning role also has a more immediate dimension. She makes decisions, subject to the approval of the President and Board of Governors, as to the nature and content of an existing Women’s Studies Program, consisting of some ten course offerings and a guest lecture series made available from time to time on the various campuses of the College

in the Counties of Halton and Peel. She likewise makes decisions respecting the services provided by the College's Centre for Women, located on the Oakville campus. It is there that she has her office and it is there that Mrs. Satchell works as her secretary. As Director of the Centre for Women, Mrs. Wilkinson is responsible for the preparation and administration of its budget.

7. As an educator Mrs. Wilkinson is involved in the research and development of the courses in Women's Studies mentioned above and is required to speak to various groups on and off-campus. The fostering of awareness among women at the Centre would also involve her in education, albeit in a less formalized sense.

8. Her office in the Centre for Women is the site of her practical work as an advisor and ombudsman to women among staff and students as well as from the community. The role of the Centre is summarized in its own brochure, in part, as follows:

"The Centre is designed as a resource, referral and personal development area for women of all ages, backgrounds and occupations, in the community as well as in the college. It is a place to be with other women, a place for counselling, referral and support and a place to share skills and experience".

9. The evidence is that since its opening the Centre has provided a counselling referral service to female students, support staff and professional administration and teaching staff. By way of example, a rape victim may be given the immediate comfort of someone to talk to followed by referral to persons qualified to provide medical or emotional help. Inquiries respecting abortion may likewise be referred to those best able to provide information. Persons with marital problems may be directed to marriage counsellors or sources of legal aid.

10. It appears from the evidence that Mrs. Wilkinson and Mrs. Satchell are the only persons working at the Centre. Mrs. Wilkinson is responsible for talking with and referring women who come to the Centre with their problems. It appears, however, that when Mrs. Wilkinson is absent, as her administrative and speaking duties often require her to be, Mrs. Satchell frequently departs from her clerical and typing duties to provide the same kind of first line assistance that her superior would otherwise provide, at least to the extent of listening to the problem presented. Mrs. Satchell then normally refers the person with the problem to Mrs. Wilkinson.

11. One final aspect of the facts must be raised. The evidence is that occasionally women will come to the Centre with questions or complaints relating to their wages and working conditions and their treatment at the hands of their employer. When women employed by the respondent so present themselves, Mrs. Wilkinson or, in her absence, Mrs. Satchell, determine whether they are members of a bargaining unit represented by a union. If they are, they are immediately referred to the union that represents them and the Centre has nothing further to do with their problem. Mrs. Wilkinson is never involved in matters which would be the proper subject of a grievance under collective agreement.

12. If, however, the aggrieved female employee is not part of a bargaining unit that is represented by a union, Mrs. Wilkinson may, depending on the merits, assume the role of an ombudsman in an endeavour to research the facts and approach the responsible authori-

ties within the College with a view to achieving a settlement favourable to the employee. She testified that 3 or 4 such problems arose in the month prior to the Board's hearing. Activities of this kind would be confined to cases involving persons who are not included in either the academic staff bargaining unit or the support staff bargaining unit described in Schedule 1 and Schedule 2 of the Act, respectively. In other words, such cases could only involve persons within the college administration staff, for whom there is no statutory bargaining unit, or teachers, counsellors, librarians and support staff persons who are, by the terms of the Act, expressly excluded from the academic and support staff bargaining units. Consequently, if Mrs. Satchell were included in the support staff bargaining unit her work on individual cases involving employment problems at the Centre for Women would not relate to employees within that bargaining unit, or the academic staff bargaining unit.

13. Mrs. Satchell's duties include typing and clerical assistance to Mrs. Wilkinson in her role as planner and policy maker, described in paragraph 6, *supra*, as well as typing and clerical assistance in her counselling referral and case work. In the area of planning and policy the bulk of Mrs. Satchell's work has related to the preparation of the Status of Women Report, in respect of which her duties have largely consisted of collating and typing data and typing the report itself. In so doing, she has handled personnel data and statistics concerning the whole range of employees within the college.

It is not clear from the evidence that Mrs. Wilkinson has independent access to confidential personnel files. In all cases where she has gained access to those files for purposes of her research or of her case work, she has first obtained the approval of the Personnel Director. It is clear that any access that Mrs. Satchell has to those files is either incidental to her secretarial work on the Status of Women Report, a one-time endeavour, or occasional, being in relating to the typing of correspondence in case work. The second type of access never relates to the files of employees represented in either the academic or the support staff bargaining unit, although her work on the Status of Women Report obviously does.

14. The respondent's case rests on the view that Mrs. Satchell's position falls among those excluded from the support staff bargaining unit by Schedules 1 and 2 to the Act, which are as follows:

SCHEDULE 1

The academic staff bargaining unit includes the employees of all boards of governors of colleges of applied arts and technology who are employed as teachers, counsellors or librarians but does not include,

- (i) chairman,
- (ii) department heads,
- (iii) directors,
- (iv) persons above the rank of chairman, department head or director,
- (v) other persons employed in a managerial or confidential capacity,

- (vi) teachers who teach for six hours or less per week,
- (vii) counsellors and librarians employed on a part-time basis,
- (viii) teachers, counsellors or librarians who are appointed for one or more sessions and who are employed for not more than twelve months in any twenty-four month period,
- (ix) a person who is a member of the architectural, dental, engineering, legal or medical profession, entitled to practice in Ontario and employed in a professional capacity, or
- (x) a person engaged and employed outside Ontario.

SCHEDULE 2

The support staff bargaining unit includes the employees of all boards of governors of colleges of applied arts and technology employed in positions or classifications in the office, clerical, technical, health care, maintenance, building service, shipping, transportation, cafeteria and nursery staff but does not include,

- (i) foremen,
- (ii) supervisors,
- (iii) persons above the rank of foreman or supervisor,
- (iv) persons employed in a confidential capacity in matters related to employee relations or the formulation of a budget of a college of applied arts and technology or of a constituent campus of a college of applied arts and technology including persons employed in clerical, stenographic or secretarial positions,
- (v) other persons employed in a managerial or confidential capacity,
- (vi) persons regularly employed for not more than twenty-four hours a week,
- (vii) students employed in a co-operative educational training program undertaken with a school, college or university,
- (viii) a graduate of a college of applied arts and technology during the period of twelve months immediately following completion of a course of study or instruction at the college by the graduate if the employment of the graduate is associated with a certification, registration or other licensing requirement,
- (ix) a person engaged for a project of a non-recurring kind,

- (x) a person who is a member of the architectural, dental, engineering, legal or medical profession, entitled to practise in Ontario and employed in a professional capacity, or
- (xi) a person engaged and employed outside Ontario.

15. The Schedules must be read in the light of section 1 of the Act, which contains the following definitions:

- 1. (f) "employee" means a person employed by a board of governors of a college of applied arts and technology in a position or classification that is within the academic staff bargaining unit or the support staff bargaining unit set out in Schedules 1 and 2;
- 1. (1) "person employed in a managerial or confidential capacity" means a person who,
 - (i) is involved in the formulation of organization objectives and policy in relation to the development and administration of programs of the employer or in the formulation of budgets of the employer,
 - (ii) spends a significant portion of his time in the supervision of employees,
 - (iii) is required by reason of his duties or responsibilities to deal formally on behalf of the employer with grievance of an employee,
 - (iv) is employed in a position confidential to any person described in subclause i, ii, or iii,
 - (v) is employed in a confidential capacity in matters relating to employee relations,
 - (vi) is not otherwise described in subclause i to v but who, in the opinion of the Ontario Labour Relations Board should not be included in a bargaining unit by reason of his duties and responsibilities to the employer.

16. This is a case of first impression relating to the interpretation and operation of the Colleges Collective Bargaining Act, 1975. In light of the disparate approaches to the Act taken by the parties and having regard to the comments of counsel indicating that the handling and outcome of other outstanding cases may be influenced by the approach taken by the Board in the instant case, we feel it is incumbent upon the Board to clearly state what it finds to be the appropriate method of applying the Act and Schedules to determine a person's employment status.

1. *Primary characterization*

Firstly, the person in question must be characterized in order to determine, absent some express exclusion, whether they would normally fall

within the academic staff bargaining unit (Schedule 1) or the support staff unit (Schedule 2).

It should be noted that if they are characterized as professional administrators they will fall outside both bargaining units. The Act has not provided a bargaining unit for persons who are purely administrators of the College. That is clear from the exclusionary effect of section 2 of the Act, which provides, in part:

2. (1) This Act applies to all collective negotiations concerning terms and conditions of employment of employees.
- (2) No collective negotiations shall be carried on except in accordance with this Act.

Following certain basic notions of collective bargaining policy the Legislature appears to have decided that the managerial nature of administrative responsibilities so identifies the professional administrators with the interest of their employer as to make them a group inappropriate for collective bargaining. The rationale underlying this conflict of interest policy, which is now conventional wisdom in North American labour relations, was well articulated by the British Columbia Labour Relations Board in *The Corporation of the City of Burnaby* [1974] 1 Canadian L.R.B.R. 1 at 3. A professional administrator employed by a College would, therefore, *prima facie*, fall outside both bargaining units.

The Board realizes that characterization will not always be a simple and straightforward exercise. The Board has recognized the difficult gray areas that are bound to exist in the white collar area with respect to lines of demarcation between employees and persons employed in a managerial capacity or in a confidential capacity in matters relating to labour relations. (*Ajax-Pickering General Hospital* [1970] OLRB Rep. Feb. 1283; *York University* [1975] OLRB R&p. Dec. 945).

While the exercise of characterization in the context of section 1(3)(b) of The Labour Relations Act is restricted to determining whether a person performs managerial functions or is privy to confidences in matters relating to labour relations, it should be noted that there is a different and broader type of characterization that must be done as a threshold matter in references under section 82 of The Colleges Collective Bargaining Act, 1975, where the issue is whether a person is an "employee". The Act is unique in that it provides two separate and statutorily defined bargaining units, each with enumerated exclusions, some of which are the same, and some of which are different. It therefore becomes necessary to determine whether the person in question is an administrator, teacher, librarian, office clerk, cafeteria worker or whatever, in order to know, as it were, in which ball park and by which rules the game will be played.

Just as gray areas have been found to exist in the determinations under section 1(3)(b) of The Labour Relations Act, they may arise in making the initial characterization under this Act. For instance, the lines between a secretary-typist, a girl friday and an administrative assistant may be hazy and uncertain. But the lines of demarcation must be drawn in order to know under which Schedule, if any, a given person shall be assessed for inclusion or exclusion.

And just as with issues of managerial or confidential labour relations exclusions under section 1(3)(b) of The Labour Relations Act, where the duties and responsibilities of an individual contain elements of different and competing quality, for example, where some elements indicate a secretary and others indicate an administrator, any apparent conflict in the quality of duties and responsibilities may fail to be resolved by reference to quantity. To follow our example, the Board must ask itself whether the work of the person in question is predominantly and essentially the work of a secretary with a smaller added element of administrative work, or whether the mix of duties indicates an administrator who is sometimes called upon to perform a secretarial or clerical function. The parsing of the duties and responsibilities must, therefore, be both qualitative and quantitative.

2. *Secondary characterization* Once the person is characterized, the question of which Schedule applies to them is settled. The issue then remaining is whether they are among categories of persons expressly excluded from the bargaining unit described in the Schedule. One thing might be said respecting the procedure to resolve that issue.

Contrary to the approach implicit in the argument of the respondent, the starting point is the wording of the Schedules themselves and it is only to resolve uncertainty arising from the words that spell out the exceptions enumerated therein that reference is had to the definition provided in section 1(L) of the Act. The definition does not itself exclude anyone, but merely clarifies the meaning of the words found in the Schedules.

We now turn to apply the above principles and procedure to the instant case.

17. While the point was not argued before the Board, we are satisfied that Mrs. Satchell, albeit that she may perform some slight administrative duties, is not thereby excluded from the operation of the Schedules.

18. Nor does her peripheral involvement in the counselling and education functions of her superior qualify her as one whose collective bargaining status is determined under Schedule 1. It would, in our view, both torture the facts and skew the operation of Schedule 1 to find on the evidence before us, as the respondent would have it, that Mrs. Satchell is directly excluded as a person employed in a managerial or confidential capacity within the terms of section (v) of Schedule 1. She does not so qualify merely because she is left "in charge" of the Centre for Women when Mrs. Wilkinson is absent and listens to people's

problems before referring them to her supervisor or to other sources of professional assistance. While it may be that a person engaged primarily as an administrator and counsellor to assist Mrs. Wilkinson might be so excluded, it is clear that her secretary was not hired and does not function primarily in that capacity. A secretary or receptionist who deals with confidential inquiries and requests for help does not by virtue of that fact alone become a counsellor employed in a confidential capacity, any more than a secretary employed in a library who occasionally re-shelves a book becomes a librarian or the secretary to a lecturer who distributes a course syllabus becomes a teacher.

19. We find on the evidence before us that the bulk of Mrs. Satchell's duties consist of what may be described, in the traditional sense, as secretarial and clerical duties. Her occasional and peripheral responsibilities as a conduit in the referral of inquiries, albeit important, does not alter the essential and predominant nature of her position as a secretary. When asked by the Examiner what her duties were as a secretary, she answered: "Well, primarily normal secretarial duties...typing, shorthand, filing – you know, the usual routine". We find that she is a secretary.

20. Having characterized Mrs. Satchell as a secretary, the Board now looks to Schedule 2 to determine whether she is included in or excluded from the support staff bargaining unit. It is at this point that the two main issues of this reference arise: firstly, whether she is excluded from the support staff unit under section (iv) of Schedule 2 and, secondly, if not, whether she is excluded from that unit under section (v) of the same schedule.

21. Dealing firstly with section (iv), it becomes necessary to interpret the meaning of "persons employed in a confidential capacity in matters related to employee relations". Counsel for the respondent argued that this phrase imparts a wider exclusion than is found in section 1(3)(b) of The Labour Relations Act, which excludes from the category of "employees" persons "employed in a confidential capacity in matters relating to labour relations". We think not.

22. The words "employee relations" must be construed in light of the object, scheme and intention of the Act in which they appear. It is clear that the Colleges Collective Bargaining Act, 1975, deals with labour relations. Labour relations includes all facets of the collective bargaining relationship that regulate terms and conditions of employment between an employer and his employees represented by a trade union. And that is what the Colleges Collective Bargaining Act, 1975, is all about. (C.f. *Transair Limited*, 74 CLLC ¶16,111 reviewed on unrelated points, 76 CLLC¶14,024, where the Canada Labour Relations Board found no distinction between "labour relations" and "industrial relations".)

23. We need not speculate whether the draftsman of the section now before us (or of its likely forebear, section 1(1) (m) (vii) of the Crown Employees Collective Bargaining Act, 1972) decided that the term "employee relations" was more appropriate than "industrial relations" or "labour relations", because the employees in question are neither labourers nor employed in industry or whether the words "employee relations" were inserted to placate the sensibilities of persons who, although seeking the advantages of collective bargaining, would recoil from words that evoke images of rough hands, lunch pails and picket lines. Suffice it to say that the argument of counsel for the respondent is more resourceful than it is compelling. We find that having regard to the object, scheme and intention of the Act, the term "employee relations" as it is used in section (iv) of Schedule 2 has the same meaning and no meaning other than "labour relations" as that expression is defined above.

24. That is to say that the first part of section (iv) is therefore the same in meaning as the last part of section 1(3)(b) of The Labour Relations Act, which provides for the exclusion of persons “employed in a confidential capacity in matters relating to labour relations”.

25. A long line of Board decisions has produced a well-developed interpretation of the meaning of the phrase “employed in a confidential capacity in matters relating to labour relations”. See *Ladish Co. of Canada Ltd.* [1964] OLRB Rep. Dec. 438; *Falconbridge Nickel Mines Limited*, [1966] OLRB Rep. Sept. 379; *Mannesmann Tube Company Ltd.* [1966] OLRB Rep. Oct. 528; *No-Sag Spring Company Limited* [1966] OLRB Rep. Dec. 667; *International Harvester Company of Canada, Limited* [1967] OLRB Rep. Jan. 825; *Ferranti-Packard Electric Limited* [1968] OLRB Rep. Sept. 527; *Dobbie Industries Limited* [1969] OLRB Rep. Jan. 1083; *Canadian Motor Lamp Company, Limited* [1969] OLRB Rep. May 189; *Nashua Canada Limited* [1970] OLRB Rep. 921; *Comtech Group Limited* [1974] OLRB Rep. May 1291; *York University* [1975] OLRB Rep. Dec. 945; *Inglis Limited* [1976] OLRB Rep. June 270.

26. This Board has consistently followed the leading statement in the *Falconbridge* case, *supra*, at 388, that the words “confidential capacity in matters relating to labour relations” must be taken to mean “... a regular material involvement in matters relating to labour relations which are confidential because their disclosure would adversely affect the interest of the employer ...”. The rationale underlying the above decisions and the scope of their interpretation of the words in question was well summarized by the Canada Labour Relations Board in the *Transair* case, *supra*.

27. Applying the established principles to Mrs. Satchell we are satisfied that she is not excluded as being employed in a confidential capacity in matters related to employee relations. It is clear that neither she nor Mrs. Wilkinson are in any way involved in collective bargaining; nor do they through the counselling and case work of the Centre for Women become in any way involved in the grievance of anyone who is an employee as defined in the Act. On the contrary, they invariably refer such employees to their trade union.

The respondent suggested that confidentiality in relation to employee relations would arise by virtue of the possibility that Mrs. Satchell can become privy to the salary scales of persons outside the bargaining unit and that such knowledge in an employee who is represented by a union might conflict with the interest of the employer. For example, it was suggested that Mrs. Satchell might become aware of the salary of a senior female administrator on whose behalf Mrs. Wilkinson is working in relation to an alleged salary discrepancy based on sex.

But that is beside the point. As the Board stated in the *No-Sag Spring Company Limited* case *supra*:

The remuneration paid to executives is not a matter subject to collective bargaining nor is it directly connected to any such matter.

28. Lastly, we find that her involvement in the preparation of the Status of Women Report and her resulting incidental exposure to salary information does not bring Mrs. Satchell within the exclusion provided for employees employed in a confidential capacity in relation to labour relations matters.

Putting the respondent's position at its highest, we do not see how this aspect of Mrs. Satchell's duties would make her more confidential in labour relations matters than payroll clerks who have in the past been found by this Board to be employees included within their bargaining units. (See the *No-Sag Spring* case and the *Nashua* case, *supra*.)

Moreover, it is difficult to see what conflict of interest to the detriment of the employer arises by the knowledge of a member of the bargaining unit employees. In a first contract situation such information is available to the employee's association by voluntary response through the polling of its own members. And once a first contract is reached that information goes into the hands of all employees in the bargaining unit in printed form. It may, indeed, through the statistical prerogatives and duties of the College Relations Commission, become a matter of public record. (See section 57(1)(c), 57(2) and 57(3) of the Act.) There is no basis to infer that the Legislature intended an exclusion by nature of these circumstances alone.

29. Turning to the second portion of section (iv) of Schedule 2, it remains to be determined whether Mrs. Satchell is "employed in a confidential capacity in relation to ... the formulation of a budget of a college ... or of a constituent campus of a college". At the outset it should be said that the Board adopts the same approach to the interpretation of those words as it did with respect to the words immediately preceding them in paragraphs 22 *supra*. We would, furthermore, note that the budgetary exclusion is placed side by side with and in the same sentence as the "employee relations" exclusion. Reading those words in their context we find that they are intended to exclude only persons privy in a regular and material way to budgetary information, the disclosure of which would be adverse to the employer's interests in labour relations matters.

30. In any large enterprise numbers of persons will necessarily have, in varying degrees, piecemeal perceptions of data and information that go into the formulation of the budget of the institution by which they are employed. They are not, by reason of that fact alone, cast in a conflict of interest so as to be deprived of the rights of collective bargaining. There would appear to be no basis in the Act, for example, to hold that a secretarial employee intimately involved only with the preparation of final heating and fuel cost estimates for insertion into the budget of a college must, by the operation of section (iv) of Schedule 2, be automatically deprived of the right to be represented by an employee organization as defined in the Act. The Colleges Collective Bargaining Act, 1975 is not so wooden.

31. The evidence before the Board is that Mrs. Satchell types the budget which Mrs. Wilkinson prepares for the Centre for Women. It is not clear from the evidence whether what Mrs. Wilkinson prepares is a final working budget or a budget request that will be subject to the approval of higher administrative authorities. Since it is fair to assume that Mrs. Wilkinson does not have "carte blanche" to spend as she might wish, the second description of the document that Mrs. Satchell types seems more likely. In that event, Mrs. Satchell might better be described as privy to an estimate or a request, rather than to a budget. Bearing in mind that no evidence was adduced by the respondent to make it clear to the Board which of these two types of document is prepared by Mrs. Wilkinson or, indeed, what, if any, data or information might be included in such a document that would betray any material confidences relating to collective bargaining, we are unable to find, on the balance of probabilities, that Mrs. Satchell falls within the class of employees designated in the second part of section (iv) of Schedule 2.

32. The only remaining issue is whether, because of her duties and responsibilities, Mrs. Satchell falls within section (v) of Schedule 2 among, "other persons employed in a managerial or confidential capacity". It is at this point that recourse must be had to the definition of that phrase provided in section 1(L) of the Act, reproduced in paragraph 15, *supra*.

33. Applying that section to the facts as found on the basis of all of the evidence adduced, we find that Mrs. Satchell is not within the category of persons described by the Legislature in subclauses (i) (ii) and (iii) of section 1(L) of the Act. Having regard to the criteria evolved in the decisions of this Board with respect to managerial exclusions, some of which we cited in paragraph 25 *supra*, it is apparent that those subsections describe what have come to be generally accepted indicia of the managerial nature of a person's duties. (For a good review of those criteria, see *McIntyre Porcupine Mines Limited* [1975] OLRB Rep. Apr. 261.) In other words, those subsections seem to be provided primarily to give meaning to the term "managerial" in section (v) of Schedule 1). With respect to Mrs. Satchell, there is nothing in the evidence that would bring her within any of those subsections.

34. Nor, for the same reasons by which she has been found not to be excluded under the first part of section (iv) of Schedule 2, is she among those persons described in section 1(L) (v).

35. Is she then by virtue of her work for Mrs. Wilkinson, employed in a capacity confidential to a person described in subclauses (i) (ii) or (iii) of section 1(L) of the Act? In other words, is she described by the definition in section 1(L) (iv)? Counsel for the respondent has argued that Mrs. Wilkinson is clearly described by section 1(L) (i) and that Mrs. Satchell must be within section 1(L) (iv) and is therefore excluded from the support staff bargaining unit by section (v) of Schedule 2. We agree that Mrs. Wilkinson must be seen as described by section 1(L) (i). We must next address ourselves to what was meant by the Legislature when it used the words "... a person who ... is employed in a position confidential to any person described in subclause (i), (ii) or (iii)", and we must then determine whether those words apply to Mrs. Satchell.

36. We accept the submission of the respondent that subclause (iv) must be intended to relate to persons employed in a confidential capacity in matters other than employee relations (i.e., labour relations) since the latter is specifically provided for in subclause (v). However, the fact that an employee has access to confidential material does not necessarily mean that he or she is employed in a confidential capacity. In this regard, we note what was said by the Ontario Public Service Labour Relations Tribunal construing the same words in section 1(1) (m) of the Crown Employees Collective Bargaining Act, 1972:

The Tribunal considers, however, that responsibility and confidentiality in the abstract are not sufficiently valid reasons for excluding persons from collective bargaining under the Act. The fact is that many government employees assume important responsibilities, often have access to confidential information. If the Tribunal were to exclude persons from the Act on these grounds alone, a very large number of Crown employees would be deprived of collective bargaining rights. The wording of the Act does not indicate that this was the intention of the Legislature.

(from an unreported decision, *The Crown in The Right of Ontario (Workmen's Compensation Board*, dated June 20, 1975; see also the decision of the Supreme Court of Canada in *Canada Safeway Limited*, 53 CLLC ¶15,508).

37. The "confidence" referred to in section 1(1) (v) of the Act relates not so much to the material dealt with by the person in question as to the nature of the relationship between that person and the employer. And the confidence must relate to a function that is incompatible with collective bargaining.

38. Without attempting any accurate reference to existing positions within the community colleges, and simply for purposes of clarification of the meaning of subclause (iv) of section 1(L) of the Act, it would appear to this Board that a person employed as an executive assistant to persons described in the three preceding subclauses and who acted as an intimate policy sounding board to his or her superior and had substantial input into and influence on decisions of the employer relating to program policies, budgets or the disposition of grievances, would be manifestly within the group of persons described in that subclause. On the other hand, an office assistant whose duties were more mechanical might not be. Following what was said in *Canada Safeway*, *supra*, each case must be measured in the light of its own particular circumstances. Reference must be had to the breadth and depth of the confidence between the person in question and his or her superior to determine whether, and to what extent, they are a meaningful participant in the decision-making processes of the employer. This Board has elsewhere recognized the problems of degree of decision-making that present themselves in institutions where large numbers of persons may be integrated into a collectivized policy and decision-making process, and it realizes that great numbers of academic and support staff personnel may become privy to various kinds of confidential information. The issues that may arise in this context in the community colleges may not be unlike those dealt with by the Board in the *York University* case, *supra*. In dealing with those problems in the application of this Act, the Board agrees with the direction taken in the passage from the *Workmen's Compensation Board* case cited above.

39. Applying the above meaning of subclause (iv) of section 1(L) of the Act to Mrs. Satchell, we find that she is not among those defined by the subclause. Firstly, it should be stressed that her "handling" of confidential and personal inquiries at the Centre for Women is of no relevance to subclause (iv). That part of her work and that of Mrs. Wilkinson, i.e., the casework and ombudsman's work, in no way relates to the functions described in subclause (i), (ii) and (iii). Even if it did, her duties in that sphere are not "confidential" in the sense intended by the Act.

40. The true issue respecting Mrs. Satchell is whether her work in relation to the role of Mrs. Wilkinson in the formulation of program policy, the administration of the women's program or the formulation of its budget can be said to be confidential in the sense defined above. We have no difficulty in concluding that it is not. There is no evidence before us to suggest that she has any input into the program policy and budget decisions. Her contact with those matters is restricted to the typing and clerical work that forms the bulk of her responsibilities. Nor can she be said to be confidentially employed in relation to the administration of the Centre for Women. It is clear from the evidence that she has no discretion or independent authority in that regard and that when Mrs. Wilkinson is away Mrs. Satchell functions primarily as a conduit for information. She does not then become a person confidentially involved in the administration of the Centre or of the Women's Program, even

though she may become privy to the confidential problems of women who seek the Centre's services.

41. Lastly, we are not of the view that this is a case in which this Board should exercise its discretion under subclause (vi) of section 1(L) of the Act to classify Mrs. Satchell as one who should be excluded from the support staff bargaining unit. We can see no good reason, that is to say, no reason grounded in the promotion of sound labour relations, that should prompt us to do so. The scheme of the Act and the pattern of section 1(L) suggest that the Legislature intended to exclude from the bargaining units a defined list of persons whose duties and responsibilities are incompatible with collective bargaining. The residuary jurisdiction vested in this Board appears to be intended to provide a means of excluding persons who are not caught by the enumerated exclusions, but who should, because of a similar incompatibility, also be excluded. Mrs. Satchell is not such a person. There is nothing in her duties and responsibilities that would suggest that she should not be included in the support staff bargaining unit.

42. The Board hereby determines that Mrs. Helen Satchell, Secretary to the Women's Advisor to the President and Director of the Centre for Women, is an employee as defined in section 1(f) of the Colleges Collective Bargaining Act, 1975, and that she is properly within the support staff bargaining unit described in Schedule 2.

1828-75-R Teamsters Local 141 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (Applicant), v. **N. J. Spivak Limited**, (Respondent), v. Group of Employees, (Objectors).

Membership Evidence – Fraud – S50 – Whether breach of promise to hold evidence for some time before filing application is a fraud.

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members H. J. F. Ade and P. J. O'Keeffe.

APPEARANCES: *Guy Beaulieu and E. Winegarden for the applicant; J. B. Noonan and G. Shaw for the respondent; Daniel V. McCarthy for the objectors.*

DECISION OF THE BOARD: December 22, 1976.

1. The Board certified the applicant trade union in a decision dated April 5, 1976. The Board conducted a subsequent hearing on September 2, 1976 for the purpose of permitting the parties to show cause, having regard to the Board's requirements for promptness and due diligence, as to why the Board should hear evidence in respect of a number of allegations made subsequent to the Board's decision to certify. The Board released a decision on September 22, 1976 in which it stated at paragraph 3:

"Having regard to the evidence adduced at the September 2nd hearing the Board is satisfied that the allegations of improper conduct directed against Messrs. Kazarowski and Joraska pass the two minimum conditions as referred to in the *York University* case (*supra*) and accordingly it is the decision of the Board to hear evidence as to the substance of these allegations."

2. At the subsequent hearing of November 30, 1976 the allegation that Mr. Kazarowski had been the victim of union threats and intimidation was withdrawn by the objectors and the allegation that Mr. Joraska had been subjected to the same threats and intimidation was dismissed by the Board. The evidence does not support a finding of unlawful activity by Mr. Winegarden the union representative or by anyone else acting on behalf of the trade union. Indeed, the only contact Mr. Winegarden had with employees of N. J. Spivak Ltd. was at the general meeting of March 11 at which he addressed the employees but did not in any way threaten or coerce them.

3. The Board went on at paragraph 4 of its September 22, 1976 decision to further determine:

"The objectors have also alleged that the applicant filed membership cards in support of its application which had been fraudulently obtained. In circumstances such as these the Board does not apply the 'reasonable diligence' test with respect to the time of the making of the allegations. (See *Sandercock Construction Limited* case [1970] OLRB Rep. Jan. 1252, *Di Lorenzo Construction Company* [1970] OLRB Rep. April 33). Furthermore, the Board has found that in circumstances such as these a fresh application for termination of bargaining rights under section 50 of the Act can be made. (See *L'Abbe Construction Limited* case [1971] OLRB Rep. April 244). Having regard to the foregoing the Board is prepared to hear evidence in respect of the allegations of fraud as particularized in paragraph 1 of the July 27, 1976 letter sent to the applicant on behalf of the objectors."

4. The evidence going to the alleged fraud as adduced at the new hearing is conflicting. The employee witness appearing on behalf of the objectors testified that there was an understanding reached at a meeting of the employees held at the union hall on March 11, 1976 whereby the employees would sign membership cards but the union would hold the cards in trust pending a meeting between the representatives of the employee association and the company. The evidence called by the union was to the effect that there was no such undertaking. Mr. Winegarden, the international representative of the union, testified that the employees voted to sign cards which would be used in a certification application. The objectors' witness testified that the vote was only in respect of the signing of the cards. The evidence is clear on three points:

- (1) all of the employees who signed membership cards paid the dollar required by statute and were not given to believe that the dollar would be repaid if the application was not made. The alleged fraud cannot be construed as one involving "conditional payment."
- (2) Mr. E. Winegarden, the international representative who represented the union at the March 11 meeting with the Spivak employees, did *not*

give a verbal undertaking to hold the cards. None of the witnesses appearing on behalf of the objectors testified that he did.

- (3) None of the employees who were present at the March 11 meeting contacted Mr. Winegarden after the application was filed in respect of his alleged breach of trust.

5. Mr. Donald Munroe, an employee of the respondent company, testified that he informed Mr. Malcolm Wilson, the employee of the respondent who initiated the petition against the union, of the alleged breach of trust and accompanied Mr. Wilson to the initial certification hearing with the intention of informing the Board of the conditional signing. Whereas Mr. Wilson gave evidence as to the voluntariness of the petition and was subject to cross-examination Mr. Munroe testified that he was not given an opportunity to testify. Mr. Munroe was present at the hearing and did not come forward when the Board asked if there was any further evidence on behalf of the objectors and he made no subsequent representations to the Board in that regard. Mr. Wilson although aware of the circumstances surrounding the alleged fraud when he gave evidence at the initial hearing made no mention of it until April 27, 1976, some 25 days after the issuance of the Board's decision. In a letter dated March 27, 1976 he listed the alleged fraud as one of the grounds upon which the Board should reconsider its decision of April 2, 1976.

6. The Board dealt with the issue of fraud within the meaning of section 50 of the Act in the *Carleton University Academic Staff Association* case [1976] OLRB Rep. Aug. 450 wherein at paragraph 10 the Board stated:

"The Board does not propose to elaborate fully on the state of the law in connection with the ingredients that constitute the committal of a 'fraud' for purposes of section 50 of The Labour Relations Act save to the extent of relying upon the classic statement of the Privy Council in *Derry v. Peek* (1889) 14 A.C. 337 at p. 374:

'First, in order to sustain an action of deceit, there must be proof of fraud and nothing short of that will suffice. Secondly, fraud is when it is shown that a false representation was made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but the instance of the second, for one who rules a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must I think almost be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.'

Accordingly, it appears clear that a prerequisite of establishing a 'fraud' is the necessity of demonstrating that the statements or representations relied upon were known or ought reasonably to have been known by the purveyors thereof to have been false."

The *Carleton* decision (supra) applied the *Derry v. Peek* (supra) tests having regard to the labour relations mischief that section 50 of the Act is designed to remedy. This Board also considers the tests as set out in *Derry v. Peek* (supra) to be appropriate criteria to be used in determining if there has been a fraud within section 50 of the Act provided that these tests are applied in their labour relations context. The Board in the *L'Abbe Construction Limited* case (1971) OLRB Rep. March 141 found that conduct which might not be construed as fraudulent within the common law tests of *Derry v. Peek* (supra) nevertheless amounted to fraud within the meaning of section 50 (then section 44). Having regard to the meaning of section 50 of the Act the distinction drawn in the *L'Abbe* decision (supra) is an artificial one. Surely within the context of the Labour Relations Act a union's attempt to become certified on the basis of membership evidence which has in large measure been secured by the employer (as in the *L'Abbe* case), is a "false presentation" made, if not knowingly then at best "recklessly, careless whether true or false" and accordingly is a fraud within the *Derry v. Peek* (supra) tests as applied in their labour relations context. The *L'Abbe* decision does not cause the Board to look beyond the *Derry v. Peek* tests but rather to apply the tests in their labour relations context having regard to the mischief section 50 of the Act is designed to remedy.

7. The Board has reviewed the evidence in the instant case and has concluded that the objectors have not established a fraud within the meaning of section 50 of the Act. The Board, faced with conflicting evidence, has weighed that evidence against what best accords with logic and reason in the circumstances and has concluded that the union's evidence is to be preferred. *Firstly* the employees did not face a deadline as to when they could sign union cards. There is no prohibition against signing union cards at any time and in the face of the concerns raised at the meeting of March 11, 1976 as to the consequences which might follow the employer's knowledge of their signing the Board is at a loss to understand why all but two of the employees would sign cards which were to be held. A decision to either sign the cards and have these used in support of an application for certification *or* to refrain from signing pending a final meeting with the employer is more consistent with what best accords with reason and good sense. *Secondly*, if such an undertaking were made then surely at least some of the employees would have made representations to the union at the time of the posting of the notice; none did. The company and the objectors ask the Board to view the statement of desire filed with the initial application as corroborative of the evidence of the intervening employees that there was a breach of trust and to consider it more or less as an alternative to a direct approach to the union. The Board has already found that document not to have been a voluntary expression of those who signed it and does not consider it to be corroborative of the evidence in support of the allegation of fraud. *Thirdly*, even if the Board were to accept that the employees themselves reached an understanding that the cards would be held (and we are not prepared to make that finding on the basis of the evidence that we have heard) the evidence does not establish that that understanding was communicated to the union representative and the evidence is clear that at no time did the union representative, Mr. Winegarden, undertake to hold the cards. The third factor alone is sufficient to defeat the allegation of fraud. There is no evidence of any attempt to mislead the Board with respect of the membership evidence.

8. The Board finds that 75 per cent of the employees in the bargaining unit signed union membership cards which were not obtained by fraud and which clearly stated:

"I hereby request and accept membership in Union Local No. 141, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, and promise to abide by the By-Laws and Constitution of the Union. I further authorize the Union to represent me in any negotiations with my employer, concerning wages, hours and other working conditions."

This documentary evidence of membership is clear, unequivocal and unconditional and meets all the statutory requirements as to form, substance and timeliness. Whereas the Board may have been prepared to exercise its discretion under Section 7(2) of the Act and order a vote *if it had been established* at the initial hearing on March 29, 1976 that the employees' understanding was that the cards would be held, the Board is not prepared at this late date to amend or revoke its April 5, 1976 decision to certify the applicant, nor can it find on the evidence a fraud within the meaning of section 50 as would cause it to revoke its certificate.

9. The request for reconsideration is denied.

1082-76-R Canadian Union of Public Employees, (Applicant), v. The Children's Aid Society of the District of Nipissing, (Respondent).

Bargaining Unit – Whether "group home parents" properly included in clerical unit.

BEFORE: M. G. Picher, Vice-Chairman, and Board Members A. Gribben and F. W. Murray.

DECISION OF THE BOARD: December 22, 1976.

1. The Board by its Order dated October 13, 1976 certified the applicant by way of an interim certificate pursuant to section 6(1) (a) of the Act. The respondent sought to have excluded from the bargaining unit the secretary to the office manager and persons described as "group home parents". The parties subsequently agreed that there is no one presently in the position of secretary to the office manager, and that the person so described on the lists filed by the employer should in fact be described as a clerk-typist and included in the bargaining unit. The only outstanding issue, therefore, is whether "group home parents" are appropriate for inclusion in the bargaining unit sought by the applicant. The respondent argues that by virtue of their having a distinct community of interest they are not.

2. The agreed to bargaining unit includes both office and clerical workers (i.e., clerk-typists and an accountant) and professional social workers employed by the respondent, whose offices are at North Bay.

3. The considerations to be weighed in determining what is an appropriate bargaining unit were reviewed and applied in the recent, and as yet unreported, decision of this Board in *Eastern Ontario Health Unit*, (Board File No. 1211-75-R, November 15, 1976), where the Board stated:

The Board in determining the appropriate bargaining unit in a given situation performs a balancing function. On the one hand the Board must have due regard for the rights of employees to organize as they wish; the right of self-organization. (See *Ponderosa Steak House* case [1975] OLRB Rep. Jan. 7). On the other hand, however, the Board must be mindful of its responsibility under section 6 of the Act to look to a bargaining unit which is "appropriate" in so far as it will support a viable collective bargaining structure. The considerations underlying the Board's balancing function have been succinctly described in the *Ponderosa* case, (*supra*) wherein at paragraph 12 it is stated:

"The determination of what constitutes a viable collective bargaining structure requires the Board to consider matters of industrial relations policy, such as community of interest and fragmentation of employees. Community of interest may be a requisite for viable collective bargaining, since the representation of disparate employee groups by one bargaining agent may put impossible strains upon it as it performs its role in the bargaining process. At the other extreme, a too narrow definition of community of interest may create undue fragmentation of employees, leading to a weak employee presence at the bargaining table, or the possibility of jurisdictional disputes among competing bargaining groups. It should be observed, however, that the Act does not create any presumption in favour of the most comprehensive unit of employees, even though these employees may have a community of interest..."

4. The principles governing the determination of community of interest were articulated in the leading *Usarco* case [1967] OLRB Rep. Sept. 526 and the *Essex Health Association* case [1967] OLRB Rep. Nov. 716. In *Usarco*, at page 529, the Board listed the following criteria:

1. Nature of work performed
2. Conditions of employment
3. Skills of employees
4. Administration
5. Geographic circumstances
6. Functional coherence and interdependence.

Some of the above criteria may bear greater or lesser weight in an assessment of community of interest, depending on the particular fact situation.

5. Group home parents are persons employed by the respondent to live in a house leased and furnished by the Children's Aid Society and in which teenagers in the care of the Society are housed. There seems little doubt that the group home parents do have a separate community of interest when measured by the above standards. It appears from the evidence

in the Examiner's report that the group home parents would be distinguishable from the office staff and the social workers under most of the heads enumerated in *Usarco*.

6. Mrs. Roy Clarke, the group home parent examined, testified that she and her husband lived in a home where she cares for from 2 to 7 children, depending on fluctuating placement requirements. While her husband lives in the home he is not paid or employed by the Society. The Clarke's have their own furnishings in their bedroom and the living room, but the house is otherwise furnished and equipped by the respondent, save for such fixtures as are supplied and maintained by the person from whom the Society rents the premises. There is no doubt that Mrs. Clarke and her husband were screened before her hiring and that the Society has an interest in having responsible persons and their spouses living in group homes. But it does not appear from the evidence that such persons are given any formal responsibilities to counsel the children or provide the kinds of service or attention that one would associate with a social worker. Nor do they appear to be expected to achieve the kind of intimacy with the children that one would normally expect to find in an adoptive parent or even a foster parent. Their duties might best be described as very basic care and supervision, they see to it that the children are fed, clothed and housed. As Mrs. Clarke put it:

Well, when they come in I see that they have a bed and a place to stay and I look after them.

... I watch them. I report on them. I have my book that I keep with their name, their birthdays, and their height, their weight, in case they run away and if any difficulties come up. I write it up so that the social workers, if they do want to ask me about them, I can tell them, I can report to them.

7. The nature of their work is quite different from that of the social worker and there is little or no real role integration or functional interdependence between them and the social worker. They do not attend staff meetings of the Society nor in any true sense function as caseworkers. Their contact with the social worker is restricted to the times when the social worker first brings the child to the house, save for the irregular reporting function described in the above testimony.

8. Their work is equally different from the work of the office personnel. Their contact with the office staff is similarly limited. Mrs. Clarke testified that she takes her grocery bills to the office every two weeks. Otherwise she calls the office for help or advice only in emergencies or in the face of a major purchase for the home. At those times her calls are usually to the Local Director, Mr. Blunt. While she reports expenses to the office she is not subject to a set budget and has never been directed to curb or alter the spending that she must do in the discharge of her duties. It appears clear from the evidence that the functional independence of group home parents sets them apart from the office staff in terms of community of interest.

9. The group home parents are different from the office staff or social workers as well by dint of training and educational background. There is no evidence of any formal training or experience required for them. They differ as well in respect of skills and the place and conditions of employment. We are satisfied that they have a separate community of interest.

10. But the matter does not end there. In assessing the make-up of a viable collective bargaining unit, that is to say, a bargaining unit that will endure and promote sound labour relations, the Board must go further. It must consider whether the utility of smaller units based on a separate community of interest overrides the disutility that might result from the fragmentation of the respondent's employees for collective bargaining purposes. In some circumstances the delineation of separate bargaining units may conduce to healthy labour relations. In other circumstances it may produce the balkanization described in *Ponderosa*.

11. The Board must endeavour to define bargaining units that can, at the very least, be rationalized and understood as coherent units with a common and consistent base. That may be done by reference to community of interest or, where sound policy requires it, by some broader reference. And while it is true, as the Board noted in the *Ponderosa* case, that the Act creates no presumption in favour of the most comprehensive unit of employees, there may be circumstances where a comprehensive unit offers the alternative that will best serve the collective bargaining relationship of the parties.

12. As reflected in the *Eastern Ontario Health Unit case, supra*, one of the factors that the Board considers in rationalizing the appropriateness of the bargaining unit is the agreement of the parties on that portion of the unit that is not in dispute.

13. In the instant case the Board notes that the parties have agreed to include the clerk-typists and accountant in the same bargaining unit as the social workers. When the office and clerical staff are compared to the social workers in light of the criteria in the *Usarco* case, it is apparent that they, like the group home parents, have their own community of interest. (See the Board's finding respecting the separate community of interest between secretaries and social workers in the *Children's Aid Society of Huron County* [1971] OLRB Rep. Oct. 632) It appears that the most that can be said to describe common ties between the office staff and the social workers is that they sometimes work on the same premises and that they are employed and supervised by common supervisors. Nearly as much can be said of the group home parents. That being so, and bearing in mind the relatively small number of employees in the bargaining unit, we see no good reason why the group home parents should not be included in a single bargaining unit along with the office employees and social workers. Such a unit would, in our view, be a viable collective bargaining structure.

14. The Board finds that all employees of the respondent at its offices at North Bay and in the District of Nipissing, save and except supervisors and persons above the rank of supervisors, the secretary to the local Director, all persons regularly employed for not more than 24 hours per week and students employed by the respondent during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

15. A certificate, in lieu of the interim certificate, will now issue to the applicant.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING NOVEMBER 1976

Applications For Certification

BARGAINING AGENTS CERTIFIED

No Vote Conducted

1211-75-R: The Canadian Union of Public Employees (Applicant) v. Eastern Ontario Health Unit (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent employed in the United Counties of Stormont, Dundas, Glengarry and Prescott-Russell and the City of Cornwall save and except the Medical Officer of Health, the Business Administrator, the Director of Environmental Hygiene, the Director of Nursing Department, the Director of Dental Department, Director of Home Care Program, persons employed as physiotherapists, or occupational therapists in a home care program operated by the respondent, social workers, the Secretarial Supervisor, the Secretary to Medical Officer of Health, Secretary to the Business Administrator (at both the Cornwall and the L'Original office), persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons covered by a subsisting collective agreement." (80 employees in the unit).

0049-76-R: International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employees' and Bartenders' International Union, A.F.L.-C.I.O. and C.L.C. (Applicant) v. Seaway Hotels (Ontario) Limited (Respondent).

Unit: "all full time and part time, male and female bartenders tapmen, bar-boys and improvers in the employment of the respondent in the area known as The Hook and Ladder Club in the Beverley Hills Hotel, 1677 Wilson Avenue, Downsview, Ontario." (6 employees in the unit). (*Having regard to the foregoing*).

0432-76-R: Ontario Nurses' Association (Applicant) v. St. Jean De Brebeuf Hospital (Respondent).

Unit K61: "all registered and graduate nurses employed by the respondent at Sturgeon Falls engaged in a nursing capacity, save and except head nurses, persons above the rank of head nurses, persons regularly employed for not more than twenty-four hours per week and student nurses employed during the school vacation period." (40 employees in the unit). (*Having regard to the foregoing and to the agreement of the parties*). (*clarity note* – see Report of full decision [1976] OLRB Rep. November).

Unit #2: "all registered and graduate nurses engaged in a nursing capacity at Sturgeon Falls who are regularly employed by the respondent for not more than twenty-four hours per week and student nurses employed during the school vacation period, save and except head nurses and persons above the rank of head nurses." (9 employees in the unit).

0780-76-R: Labourers' International Union of North America, Local 183 (Applicant) v. W. J. Realty Management (Respondent).

Unit: "all full time employees of the respondent engaged in cleaning and maintenance at 2550 Kingston Road, Toronto, including resident superintendents, save and except property managers, persons above the rank of property manager, office and clerical staff." (2 employees in the unit). (*Having regard to the agreement of the parties*).

0945-76-R: Teamsters' Union Local 938 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Don Anderson Haulage Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent working at or out of Stouffville, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (49 employees in the unit).

1005-76-R: Bakery & Confectionery Workers' International Union of America, Local 264 (Applicant) v. Sandra Instand Coffee Company Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at 144 Mills Road, Ajax, Ontario, save and except foremen and foreladies, persons above the rank of foreman and forelady, office staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (49 employees in the unit). (*Having regard to the agreement of the parties*).

1046-76-R: Labourers' International Union of North America, Local 837 (Applicant) v. Kandrac Construction Company Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (9 employees in the unit).

1093-76-R: Labourers' International Union of North America, Local 183 (Applicant) v. B. G. Checo Engineering Ltd. (Respondent) v. International Brotherhood of Electrical Workers, Local 353 (Intervener #1) v. Electrical Contractors Association of Toronto (Intervener #2).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit). (*Having regard to the foregoing*).

1154-76-R: International Brotherhood of Painters and Allied Trades Local Union 1891 (Applicant) v. Jacobs and Densmore Limited (Respondent).

Unit: "all painters and painters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (10 employees in the unit). (*clarity note* – see Report of full decision [1976] OLRB Rep. Nov.).

1171-76-R: International Union of Operating Engineers, Local 793 (Applicant) v. Northwest Excavating Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of Northwest Excavating Limited working in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and those above the rank of non-working foreman." (7 employees in the unit). (*Having regard to the agreement of the parties*).

1194-76-R: Service Employees International Union, Local 204 A.F.L.-C.I.O.-C.L.C. (Applicant) v. Orillia Nursing Home (a.k.a. Hannaford Nursing Home) owned and operated by Chadee Holdings Limited (Respondent).

Unit: "all the employees employed by the respondent in Orillia, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, foremen, persons above the rank of foreman and office staff." (31 employees in the unit).

1208-76-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Town of Ancaster (Respondent).

Unit: "all employees of the respondent in the Public Works Department, save and except foremen, persons above the rank of foreman, office and clerical employees." (20 employees in the unit).

1219-76-R: The Canadian Union of Public Employees (Applicant) v. Deem Management Services Limited carrying on business as Newmarket Extended Care & Convalescent Centre (Respondent).

Unit #1: "all employees of the respondent at its nursing and convalescent home at Newmarket, Ontario, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, physiotherapists, occupational therapists, office and clerical staff and persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period (hereinafter referred to as bargaining unit # 1)." (78 employees in the unit). (*clarity note – see Report of full decision [1976] OLRB Rep. Nov.*).

Unit #2: "all employees of the respondent at its nursing and convalescent home at Newmarket, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period save and except supervisors persons above the rank of supervisor, registered and graduate nurses, physiotherapists, occupational therapists, office and clerical staff (hereinafter referred to as bargaining unit #2)." (39 employees in the unit).

1221-76-R: Graphic Arts International Union Local 12L (Applicant) v. Bonar and Bemis Ltd. – Graphic Arts Division (Respondent).

Unit: "all Lithographers, their apprentices and helpers, save and except artists, rubber plate moulders, rubber cutters, non-working foremen, salesmen, clerical support staff and those above the rank of foremen employed by Bonar & Bemis Graphic Arts Division at 397 Humberline Boulevard, Rexdale, Ontario." (5 employees in the unit). (*Having regard to the agreement of the parties*).

1228-76-R: The International Union of Bricklayers & Allied Craftsmen Local #10 Kingston Ont. (Applicant) v. Ontario Formwork (Central) Limited (Respondent).

Unit: "all cement masons and cement masons' apprentices in the employ of the respondent in the County of Lennox and Addington, and the County of Frontenac and the Townships of Rear of Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1243-76-R: Christian Labour Association of Canada (Applicant) v. D. L. Stephens Contracting Niagara Limited (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener).

Unit: "all employees of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit). (*Having regard to the representations before it*).

1247-76-R: Canadian Union of Public Employees (Applicant) v. Rest Haven Nursing Homes of St. Williams (1974) Limited (Respondent).

Unit: "all employees of the respondent at its nursing home in St. Williams, Ontario, regularly employed for not more than twenty-four hours per week and students during the school vacation period, save and except professional medical staff, registered and graduate nurses, under-graduate nurses, administrator, supervisor, and persons above the rank of supervisor." (5 employees in the unit). (*Having regard to the partial agreement of the parties*).

1248-76-R: Office and Professional Employees International Union, Local 343 (Applicant) v. St. Catharines Community Credit Union Limited (Respondent).

Unit: "all office and clerical employees working at the main office or branches of the respondent at St. Catharines, save and except the Loan Officer, Assistant Manager, Treasurer-Manager, persons above the rank of Loan Officer, Assistant Manager and Treasurer-Manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (7 employees in the unit).

1251-76-R: Ontario Nurses' Association (Applicant) v. Corporation of the United Counties of Stormont, Dundas and Glengarry (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity at the Glen Stor Dun Lodge, Cornwall, save and except the Director of Nursing and persons above the rank of Director of Nursing." (15 employees in the unit). (*Having regard to the agreement of the parties*).

1252-76-R Ontario Nurses' Association (Applicant) v. The Brantford General Hospital (Respondent).

Unit: "all registered and graduate nurses engaged by the respondent in a nursing capacity for not more than twenty-four hours per week, at Brantford, save and except head nurses and persons above the rank of Head nurse." (95 employees in the unit). (*Having regard to the agreement of the parties*).

1254-76-R: Canadian Union of Public Employees (Applicant) v. The Roman Catholic Episcopal Corporation of Ottawa (Respondent).

Unit: "all lay employees of the respondent at the Cimetiere Notre Dame d'Ottawa, on Montreal Road, in the City of Vanier, save and except foremen, persons above the rank of foreman, those regularly employed for not more than twenty-four hours per week, office employees, and students employed during the school vacation period." (19 employees in the unit). (*Having regard to the agreement of the parties*).

1264-76-R: Carpenters' District Council of Toronto and Vicinity, on behalf of Locals 27, 666, 681, 1133, 1963, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Durham Foundations (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1272-76-R: Service Employees Union, Local 204 Affiliated with AFL-CIO-CLC (Applicant) v. Mayberry Developments Limited (Respondent). Unit: "all employees of the respondent in Metropolitan Toronto, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, foremen, persons above the rank of supervisor or foreman, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (16 employees in the unit). (*Having regard to the agreement of the parties*).

1300-76-R Local Union 636 of the International Brotherhood of Electrical Workers (Applicant) v. Orillia Water, Light and Power Commission (Respondent).

Unit: "all office and clerical employees of the respondent in Orillia, save and except the secretary to the general manager, supervisors, persons above the rank of supervisor, persons who work less than twenty-four (24) hours per week, students employed during the school vacation period and persons represented under subsisting collective agreements." (10 employees in the unit). (*Having regard to the agreement of the parties*).

1304-76-R: Labourers' International Union of North America, Local 183 (Applicant) v. Omega Group Homes Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, employed on residential construction, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

1306-76-R: Labourers' International Union of North America, Local 183 (Applicant) v. Savini Construction Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (12 employees in the unit).

1322-76-R: Labourers' International Union of North America, Local 247 (Applicant) v. PLS Construction Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in the County of Lennox and Addington, and the County of Frontenac and the Townships of Rear of Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

1323-76-R: Christian Labour Association of Canada (Applicant) v. Benevolent Society 'Heidehof' (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent employed at 600 Lake Street in the City of St. Catharines, Ontario save and except supervisors and persons above the rank of supervisor, the head nurse and the bookkeeper." (41 employees in the unit). (*Having regard to the agreement of the parties*).

1335-76-R: International Brotherhood of Painters and Allied Trades Local Union 1891 (Applicant) v. A & D Drywall (Respondent).

Unit: "all painters and painters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*clarity note* – Report of full decision [1976] OLRB Rep. Nov.).

1336-76-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Applicant) v. The Butcher Engineering Enterprises Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Brampton, Ontario save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (111 employees in the unit). (*Having regard to the agreement of the parties*).

1338-76-R: United Steelworkers of America (Applicant) v. J. G. Sweet (Respondent).

Unit: "all employees of the respondent employed at the Abitibi Mill Cafeteria at Iroquois Falls, save and except foremen, persons above the rank of foreman, office and sales staff." (11 employees in the unit). (*Having regard to the agreement of the parties*).

1346-76-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the City of Nanticoke (Respondent) v. Group of Employees (Objectors).

Unit: "all office, clerical and technical employees of the respondent in the City of Nanticoke save and except supervisors, and those above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (16 employees in the unit). (*Having regard to the agreement of the parties*).

1360-76-R: The Canadian Union of Public Employees (Applicant) v. The Dufferin-Peel Roman Catholic Separate School Board (Respondent).

Unit: "all of the respondent's school secretaries and library clerks employed at its schools, save and except employees employed on a casual basis of intermittent and irregular hire and government-funded programs, and employees regularly employed for less than seventeen-and-one-half (17-1/2) hours per week." (62 employees in the unit). (*Having regard to the agreement of the parties*).

1365-76-R: Amalgamated Clothing and Textile Workers Union (Applicant) v. F & B Clothing (Cornwall) Limited (Respondent).

Unit: "all employees of the respondent at Cornwall, Ontario, save and except foremen, foreladies, persons above the rank of foreman and forelady, supervisors, designers, sales and office staff." (80 employees in the unit).

1375-76-R: The International Association of Bridge, Structural & Ornamental Ironworkers, Local 736 (Applicant) v. Dome Metal Erectors Ltd. (Respondent).

Unit: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1376-76-R: The Federation of Community Agency Staffs (Applicant) v. Children's Aid Society of Oxford County (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent, save and except the administrative secretary, office manager, supervisors, persons above the rank of supervisor and persons regularly employed for not more than twenty-four hours per week." (14 employees in the unit). (*Having regard to the partial agreement of the parties*).

1378-76-R: Christian Labour Association of Canada (Applicant) v. Rustshield Plating Limited (Respondent).

Unit: "all employees of the respondent in Windsor, save and except foremen, persons above the rank of foreman, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (28 employees in the unit).

1405-76-R: Labourers' International Union of North America, Local 183 (Applicant) v. Kevendale Developments Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, employed on residential construction, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

1406-76-R: United Steelworkers of America (Applicant) v. Store Metals Limited (Respondent).

Unit: "all employees of the respondent at Markham, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (41 employees in the unit). (*Having regard to the agreement of the parties*).

1420-76-R: Graphic Arts International Union Local 12L (Applicant) v. Nor Baker limited (Respondent).

Unit: "all lithographers their apprentices and helpers, save and except non-working foremen, persons above the rank of non-working foreman employed at 37 Jutland Road, Etobicoke, Ontario." (21 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note* - see Report of full decision [1976] OLRB Rep. Nov.).

Applications Certified Subsequent to Pre-Hearing Vote

1108-76-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) (Applicant) v. Renold Canada Ltd. (Respondent) v. Canadian Union of Operating Engineers (Intervener).

Unit: "all employess of the respondent in Brantford, Ontario, save and except foreman, persons above the rank of foreman, head warehouseman, office and sales staff, persons employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (30 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		30
Number of persons who cast ballots	24	
Number of ballots marked in favour of applicant	23	
Number of ballots marked in favour of intervener	1	

1137-76-R: Canadian Chemical Workers Union (Applicant) v. Canadian Pittsburgh Industries Ltd., Brantford, Ontario (Respondent).

Unit: "all employees of the respondent at its Brantford, Ontario plant, save and except foreman and those above the rank of foreman." (5 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		5
Number of persons who cast ballots	5	
Number of ballots marked in favour of Canadian Chemical Workers Union	5	
Number of ballots marked in favour of International Chemical Worker's Union Local 172	0	

1206-76-R: Canadian Union of Public Employees (Applicant) v. City of Brampton Public Library Board (Respondent).

Unit: "all employees of the respondent at Brampton, Ontario, regularly employed for not more than twenty-four (24) hours per week, save and except (supervisors) Branch and Division Heads, persons above the rank of (supervisor) Branch and Division Heads and a confidential secretary to each of the Branch and Division Heads." (77 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		77
Number of persons who cast ballots	67	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	39	
Number of ballots marked against applicant	27	

Applications Certified Subsequent to Post-Hearing Vote

1027-76-R: Sheet Metal Workers' International Association (Applicant) v. Libby, McNeill & Libby of Canada, Limited (Respondent) v. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) Local 251 (Intervener).

Unit: "all employees of the respondent's container factory at 49 Libby Street, Wallaceburg, Ontario engaged in production and maintenance work, save and except foremen and supervisors; persons above the rank of foreman and supervisor, office, technical and sales staff and security guards." (89 employees in the unit).

Number of names of persons on list as originally prepared by employer		90
Number of persons who cast ballots	85	
Number of ballots marked in favour of applicant	76	
Number of ballots marked in favour of intervener	9	

1068-76-R: London and District Service Workers' Union Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Extendicare Ltd. (Respondent).

Unit: "all employees of the respondent at its nursing home in London, Ontario regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, foremen, persons above the rank of supervisor or foreman, office staff and employees covered under subsisting collective agreements." (57 employees in the unit).

Number of names of persons on revised voters' list		55
Number of persons who cast ballots	27	
Number of ballots marked in favour of applicant	24	
Number of ballots marked against applicant	3	

1154-76-R: Shopmen's Local Union No. 757 of the International Association of Bridge, Structural and Ornamental Iron Workers (Applicant) v. Connie Steel Products Limited (Respondent).

Unit: "all employees of the Company in Vaughan Township, save and except office and clerical employees, watchmen, guards, foremen and persons above the rank of foreman and employees engaged in field erection and/or construction work." (22 employees in the unit).

Number of names of persons on list as originally prepared by employer		20
Number of persons who cast ballots	21	
Ballots segregated and not counted	1	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	13	
Number of ballots marked against applicant	6	

1245-76-R: Service Employees Union, Local 478, A.F.L.-C.I.O.-C.L.C. (Applicant) v. Sensenbrenner Hospital (Respondent).

Unit: "all employees of the respondent at Kapuskasing, Ontario regularly employed for not more than twenty-four hours per week and students employed during the school vacation period save and except supervisors, persons above the rank of supervisor, professional medical staff, graduate and undergraduate nurses, graduate and student dietitians, graduate and undergraduate pharmacists, technical personnel office and clerical staff and persons covered by subsisting collective agreements." (10 employees in the unit).

Number of names of persons on list as originally prepared by employer		11
Number of persons who cast ballots	9	
Number of ballots marked in favour of applicant	8	
Number of ballots marked against applicant	1	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

1567-75-R: International Association of Bridge, Structural and Ornamental Ironworkers, Local 736 (Applicant) v. Sandrin Precast Limited (Respondent) v. Labourers' International Union of North America, Ontario District Council (Provincial), by and behalf of its affiliated Local Unions, Local 506 and Local 1059 (Intervener). (3 employees).

0730-76-R: Labourers' International Union of North America, Local 183 (Applicant) v. W. J. Realty Management (Respondent).

Unit: "all full time employees of the respondent engaged in cleaning and maintenance at 75 Halsey Avenue and 65 Halsey Avenue, Toronto, including resident superintendents, save and except property managers, persons above the rank of property manager, office and clerical staff." (7 employees in the unit). (*Having regard to the agreement of the parties*).

0872-76-R: Canadian Union of Public Employees (Applicant) v. The Sault Ste. Marie Public Library Board (Respondent). (47 employees).

1015-76-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1963, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Armbró Materials and Construction Ltd., Armbró Holdings Ltd. (Respondent) v. A Council of Unions Acting as Representative and agent of The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union 230, International Union of Operating Engineers, Local 793 and the Labourers' International Union of North America, Local 183 (Intervener #1) v. Labourers' International Union of North America, Local 183 (Intervener #2). (22 employees).

1079-76-R: Brewery, Soft Drink, Distillery, Distributors & Miscellaneous Workers, Local 1000. Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Mother's Restaurants Inc. (Respondents) v. Group of Employees (Objectors). (20 employees).

1259-76-R: Teamsters Union Local 938 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Acklands Limited Unapco (Division) (Respondents). (11 employees).

1260-76-R: Teamsters Union Local 938 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Acklands Limited Unapco (Division) (Respondent). (11 employees).

1305-76-R: Canadian Union of Public Employees (Applicant) v. The Northumberland & Newcastle Board of Education (Respondent) v. Employee (Objector). (6 employees).

1321-76-R: International Union of Operating Engineers, Local 793 (Applicant) v. D. L. Stephens Contracting (Niagara) Limited (Respondent). (2 employees).

1330-76-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Queen's Avenue Manor Limited and Chateau Garden (London) Inc. (Respondents) v. Christian Labour Association of Canada (Intervener). (no employees).

1344076-R: Janice Martin (Applicant) v. Christian Labour Association of Canada (Respondent) v. The Canadian Hearing Society (Intervener) (23 employees).

Certification Dismissed Subsequent to Pre-Hearing Vote

1189-76-R: Upholsterers International Union of North America, AFL/CIO (Applicant) v. Craftique Originals Ltd. (Respondent).

Voting Constituency: "All employees of the employer at 98 Milvan Dr. Weston (Toronto) Ontario, save and except foremen, persons above the rank of foremen, office and sales staff." (22 employees).

Number of names of persons on list as originally prepared by employer		18
Number of persons who cast ballots	16	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	2	
Number of ballots marked against applicant	13	

Certification Dismissed Subsequent to Post-Hearing Vote

1686-75-R: Canadian Chemical Workers Union (Applicant) v. Parke, Davis & Company, Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent, Brockville, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (240 employees in the unit).

Number of names of persons on list as originally prepared by employer		228
Number of persons who cast ballots	213	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	63	
Number of ballots marked against applicant	149	

0487-76-R: Operative Plasterers and Cement Masons International Association of the United States and Canada, Local # 124, Ottawa, Hull (Applicant) v. Advance Drywall Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all plasterers and plasterers' apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (11 employees in the unit). (clarity note – see Report of full decision [1976] OLRB Rep. Nov.).

Number of names of persons on revised Voters' list		16
Number of persons who cast ballots	16	
Number of ballots marked in favour of applicant	0	

Number of ballots marked against applicant

16

0743-76-R: Labourers' International Union of North America, Local 183 (Applicant) v. Peel-Elder Developments Limited (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance at 50 Graydon Hall Drive, 100 Graydon Hall Drive, 150 Graydon Hall Drive, 75 Graydon Hall Drive and 135 Fenelon Drive, save and except property managers and persons above the rank of property manager, security guards, office and clerical staff." (17 employees in the unit).

Number of names of persons on revised voters' list		15
Number of persons who cast ballots		15
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	4	
Number of ballots marked against applicant	10	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

0975-76-R: International Union of Operating Engineers, Local 793 (Applicant) v. Pilen Construction of Canada Ltd. (Respondent). (9 employees).

0976-76-R: Labourers' International Union of North America, Local 183 (Applicant) v. Pilen Construction of Canada Ltd. (Respondent). (28 employees).

1167-76-R: The Toronto Educational Assistants Association (Applicant) v. The Toronto Board of Education (Respondent) (250 employees).

1173-76-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1963, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Visser and Visser Contractors (Respondent). (2 employees).

1236-76-R: International Chemical Workers' Union, Local 159 (Applicant) v. Kodak Canada Ltd. (Respondent) v. Group of Employees (Objectors). (13 employees).

1290-76-R: Labourers International Union of North America Local 491 (Applicant) v. Timmins Gravel Products Co. Ltd. (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener). (10 employees).

1291-76-R: Labourers' International Union of North America, Local 183 (Applicant) v. Jovin Contracting Ltd. (Respondent). (5 employees).

1294-76-R: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Barne Construction Ltd. (Respondent). (4 employees).

1364-76-R: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Eastown Electric Company Limited (Respondent). (4 employees).

1368-76-R: International Union of Operating Engineers, Local 796 (Applicant) v. Coca-Cola Limited (Respondent) v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Intervener). (3 employees).

1395-76-R: Labourers' International Union of North America Local 1081 (Applicant) v. Meridian Group Buildings (Respondent). (5 employees).

1408-76-R: Teamsters Local 879 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Western Dispatch Co. (Respondent). (16 employees).

1447-76-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Matthews Group Ltd. (Respondent). (13 employees).

1486-76-R: Labourers' International Union of North America, Local 183 (Applicant) v. Bathurst Sheppard Apartments c/o New Style Developments (Respondent). (2 employees).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0911-76-R: David Davis (Applicant) v. Teamsters, Chauffeurs, Warehousemen and Helpers, Local 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Respondent) v. Oxford Sand and Gravel Limited (Intervener). (*Granted*).

Unit: "all employees in the County of Oxford, save and except dispatcher, foremen, persons above the rank of dispatcher and foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (16 employees in the unit).

Number of names of persons on list as originally prepared by employer		15
Number of persons who cast ballots		15
Number of ballots marked in favour of respondent	5	
Number of ballots marked against respondent	10	

0949-76-R: Walter F. Press (Applicant) v. International Chemical Workers Union (Respondent) v. Imperial Leaf Tobacco Company (Intervener). (*Terminated*).

Unit: "all employees of Imperial Leaf Tobacco Company in the plant at John Street North Aylmer Ontario save and except foremen, persons above the rank of foreman, office, technical, grading and buying staff, security guards, persons regularly employed for not more than 24 hours per week and persons employed on a seasonal basis and probationary employees." (38 employees in the unit).

Number of names of persons on list as originally prepared by employer		37
Number of persons who cast ballots		34
Number of ballots marked in favour of Respondent	0	
Number of ballots marked against Respondent	34	

1181-76-R: Albert's Kosher Meat Market (Applicant) v. Canadian Food and Allied Workers, Local Union 633, Chartered by The Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Respondent). (1 employee). (*Dismissed*).

1267-76-R: Victor Derbouka (Applicant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) (Respondent). (30 employees). (*Terminated*).

1312-76-R: Glen Cober (Applicant) v. London & District Service Workers Union S.E.I.U., A.F. of L., C.I.O., C.L.C. (Respondent). (73 employees). (*Withdrawn*).

1362-76-R: Livingston Industries Employees (Applicant) v. The International Woodworkers of America, Local 2-89 (Respondent) v. Livingston Industries Limited (at its London operation) (Intervener). (106 employees). (*Dismissed*).

APPLICATION FOR DECLARATION THAT STRIKE UNLAWFUL

1287-76-U: Kandrats Construction Company Limited (Applicant) v. Sheet Metal Workers International Association, Local 537 and John Bulanda (Respondent). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO PROSECUTE

1314-76-U: Canadian Paperworkers Union (Applicant) v. Planet Paper Box Ltd. (Respondent). (*Withdrawn*).

1316-76-U: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. The Valley View Dairies Limited (Respondent). (*Withdrawn*).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

0950-75-U: Claude Browne (Complainant) v. Canron Ltd., Eastern Structural Division (Respondent) v. Canadian Workers Union (Intervener). (*Granted*).

1024-75-U: Toronto Newspaper Guild, Local 87 (Complainant) v. The Globe & Mail Limited (Respondent). (*Dismissed*).

1543-75-U National Association of Broadcast Employees & Technicians (Complainant) v. The Ontario Educational Communications Authority (Respondent). (*Granted*).

0177-76-U Warehousemen and Miscellaneous Drivers, Local Union No. 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. F. W. Woolworth Co. Ltd. (Respondent). (*Dismissed*).

0427-76-U: International Union of Operating Engineers, Local 793 and Alvin Hicks (Complainants) v. Geo. W. Crothers (1965) Limited (Respondent). (*Dismissed*).

0496-76-U: Labourers' International Union of North America, Local 493 (Complainant) v. Winson Construction Limited, Hans Wintjes and Henry Lavign (Respondents). (*Granted*).

0502-76-U: Upholsterers International Union of North America AFL/CIO (Complainant) v. Craft-line Industries Limited (Respondent). (*Granted*).

0723-76-U: Teamsters Union Local 847, Laundry and Linen Drivers and Industrial Workers, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Nalco Boats Manufacturing (Respondent).

- and -

0766-76-U: Teamsters Union Local 847, Laundry and Linen Drivers and Industrial Workers, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Nalco Boats Manufacturing (Respondent). (*Granted*).

0838-76-U Tom Moreau (Complainant) v. The Graduate Assistants' Association (Respondent). (*Withdrawn*).

0965-76-U: Everett J. Hepton (Complainant) v. (1) Corporation of Ontario Hydro (2) Canadian Union of Public Employees – C.L.C. Ontario Hydro Employees' Union Local 1000 (Respondents). (*Dismissed*).

1159-76-U: United Electrical, Radio and Machine Workers of America (UE) Local 543 (Complainant) v. Westinghouse Canada Limited Cambridge, Ontario (Respondent). (*Withdrawn*).

1185-76-U: Christian Labour Association of Canada (Complainant) v. Central Stampings Limited (Respondent). (*Withdrawn*).

1190-76-U: Toronto Civic Employees Union, Local 43 of The Canadian Union of Public Employees (Complainant) v. The Board of Governors, Riverdale, Hospital (Respondent). (*Withdrawn*).

1200-76-U: Upholsterers International Union of North America AFL/CIO (Complainant) v. Craft-line Industries Limited (Respondent). (*Withdrawn*).

1220-76-U Upholsterers International Union of North America AFL/CIO (Complainant) v. Craft-line Industries Limited (Respondent). (*Withdrawn*).

1256-76-U: Upholsterers International Union of North America AFL/CIO/CLC (Complainant) v. Edgewood Furniture Limited (Respondent). (*Withdrawn*).

1278-76-U: Mr. Gordon "E" Ross (Complainant) v. International Woodworkers of America (Respondent). (*Withdrawn*).

1288-76-U: United Brotherhood of Carpenters and Joiners of America (Complainant) v. Fleck Manufacturing Company (Respondent). (*Withdrawn*).

1310-76-U: Canadian Union of Public Employees (Complainant) v. The City of Brampton Public Library Board (Respondent). (*Withdrawn*).

1313-76-U: Canadian Paperworkers Union (Complainant) v. Planet Paper Box Ltd. (Respondent). (*Withdrawn*).

1315-76-U: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffers Warehousemen and Helpers of America (Complainant) v. The Valley View Dairies Limited (Respondent). (*Withdrawn*).

1318-76-U: Darlene Nitschais (Complainant) v. The International Association of Machinists and Aero Space Workers Local 2506 (Respondent). (*Dismissed*).

1345-76-U: Luna Moncrieffe (Complainant) v. CUPE Local 1565 and Barton Place Nursing Home (Respondents). (*Withdrawn*).

1350-76-U: The International Beverage Dispensers and Bartenders' Union – 280 (Complainant) v. The Firehall Tavern (Respondent). (*Withdrawn*).

1357-76-U: Ottawa Typographical Union, Local 102 (Complainant) v. Imprimerie Prescott Et Russell Ltee (Respondent). (*Withdrawn*).

1358-76-U: Canadian Union of Public Employees (Complainant) v. Cimetiere Notre-Dame D'Ottawa (Respondent). (*Withdrawn*).

1369-76-U: Service Employees Union, Local 204 (Complainant) v. Orillia Nursing Home (Respondent). (*Withdrawn*).

1383-76-U: Alphonso Gabbidon (Complainant) v. International Molders & Allied Workers Union AFL-CIO (respondent). (*Withdrawn*).

1386-76-U: Upholsterers International Union of North America, AFL/CIO (Complainant) v. Craftline Industries Limited (Respondent). (*Withdrawn*).

1412-76-U: Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Niagara Employment Agency (Respondent). (*Withdrawn*).

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1280-76-M: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. City View Flooring Company Ltd. (Respondent). (*Withdrawn*).

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1289-76-M: Labourers' International Union of North America, Local 506 (Applicant) v. Sandrin Precast Limited (Respondent). (*Withdrawn*).

1347-76-M: Ontario Council of the International Brotherhood of Painters and Allied Trades (Applicant) v. The Labour Bureau of the Painting Contractors of Ontario. Apollo Painting & Decorating Ltd. (Respondents). (*Withdrawn*).

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S60 – Whether Board will consider evidence of union conduct toward grievor regarding matters previously settled by agreement of the parties when hearing a subsequent application.

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Evidence – Discharge For Union Activity – Requirement for particulars – Rule 47 – Whether respondent has a duty to request particulars – Effect of evidence being adduced regarding misconduct not covered by particulars

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ONTARIO HAULERS' ASSOCIATION INC. v. REPAC CONSTRUCTION & MATERIALS LIMITED v. A COUNCIL OF TRADE UNIONS ACTING AS THE REPRESENTATIVE AND AGENT OF TEAMSTERS LOCAL UNION 230 AND LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL UNION 183 and ONTARIO HAULERS' ASSOCIATION INC. v. SHERMAN SAND & GRAVEL LIMITED (Oct)

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WAREHOUSEMEN AND MISCELLANEOUS DRIVERS' LOCAL UNION
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Evidence – Consent to Prosecute – Discharge For Union Activity – Whether persons ex-
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S79(4a) – Effect of reverse burden on assessing competing inferences in the
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COMMUNICATIONS WORKERS OF CANADA v. A.A.S. TELECOMMUNI-
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Effect of signatories being told that purpose of petition was to obtain meeting
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– Whether the Board will award costs.

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Practice – Arbitration – Parties – Whether unaccredited Association a proper party – Whether local preference hiring clause applies to all members of local or just to employees of employer – Whether local preference clause applies to work in progress –
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INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL 90 v. CANADIAN ELEVATOR MANUFACTURERS' ASSOCIATION, MORE PARTICULARLY, OTIS ELEVATOR COMPANY LIMITED and INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL 90 v. CANADIAN ELEVATOR MANUFACTURERS ASSOCIATION AND MORE PARTICULARLY, DOVER CORPORATION (CANADA) LIMITED and INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL 90 v. CANADIAN ELEVATOR MANUFACTURERS' ASSOCIATION (Dec)

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- Reconsideration – Petition – Whether the Board has the onus to investigate the voluntariness of a petition – Effect of petitioners not producing witnesses as to how each of the signatures were obtained – Whether evidence as to how envelopes containing petitions were obtained can meet requirement of evidence as to how signatures obtained.
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- Reference – Arbitration – S96 – Whether the Minister may refer to the Board a question as to the existence of a collective agreement where no request for an appointment has been made.
- ENGINEERED STRUCTURES AND COMPONENTS v. THE CARPENTERS' DISTRICT COUNCIL OF TORONTO AND VICINITY ON BEHALF OF LOCALS 27, 666, 681, 1133, 1747, 1963, 3227, 3233 OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (Nov) 660
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- INTERNATIONAL BEVERAGE DISPENSERS' AND BARTENDERS' UNION, LOCAL 280 OF THE HOTEL AND RESTAURANT EMPLOYEES' AND BARTENDERS' INTERNATIONAL UNION, A.F.L.-C.I.O.-C.L.C. v. SEAWAY HOTELS (ONTARIO) LIMITED (Nov) 676
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– Effect of Applicant sending erroneous note to employees as to time and place of vote.

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183 v. DURON ONTARIO LIMITED v. THE GENERAL CONTRACTORS' SECTION OF THE TORONTO CONSTRUCTION ASSOCIATION v. LOCAL 598 OF THE OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA v. LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 506 v. THE ONTARIO PROVINCIAL CONFERENCE OF THE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN (Nov)

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S61 – Whether threats by union to have employees fired for refusing to authorize a dues check-off pursuant to a union security clause constitutes a violation of the Act – Whether threat of physical force in same circumstances a violation – Whether threats to effect such a purpose a violation of a right protected by the Act.

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S61 – Whether trade union officials sought by intimidation or coercion to compel complainant to cease union activity or membership – Whether case should be heard by the Board or left to be dealt with by internal union procedures – Whether S61 complaint may be brought against a trade union – Whether actual intimidation or coercion must occur.

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